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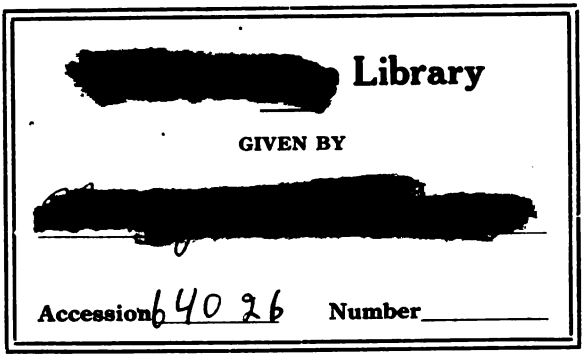

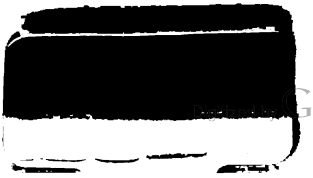

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

SEPTEMBER 14, 1918—APRIL 2, 1919

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CASES DETERMINED

AT THE

August Term, 1918.

FIRST TRUST COMPANY, Respondent, vs. HOLDEN and others, Appellants, and others, Respondents.

May 3—September 14, 1918.

Actions: Consolidation: Effect: County courts: Jurisdiction: Denying probate of will: Agreement by parties to create a trust: Appointment and discharge of administrator: Validity of trust agreement: Execution by minor heir: Ratification.

1. An order consolidating two actions merges them into one new action, which is to be entitled and prosecuted as directed by the court, and the original actions are thereby terminated and superseded.
2. Objection to the probate of a proposed will having been duly made in county court on the ground of mental incapacity of the decedent, and the issue thus made having been tried upon the evidence and the admissions of all persons interested that the objection was well founded, the court had jurisdiction to deny probate to the alleged will and to administer the estate as intestate, although said admissions were made pursuant to an agreement made out of court by the interested parties for the creation of a trust as to the property of the decedent, and although, if the will were valid, such trust agreement would be void.
3. An order of the county court in such case appointing as administrator a trust company to which the decedent's property had been conveyed pursuant to said trust agreement, and a subsequent order discharging such company as administrator, made after due examination of its accounts and a finding that, as administrator, it had no property of the estate in its possession, were within the jurisdiction of the court and were valid and effective, even though such orders were made in recognition of the fact that the property had been conveyed to the trust company as trustee and were intended to give sanction to the trust agreement as a proper and valid

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disposition of the estate and, for that reason, the court did not decree a distribution of the estate under the law governing intestacy.

4. The sole heir having become the owner of decedent's property at the time of his death, subsequent proceedings in the county court to transfer any possible interest which unborn children of said heir might have had in the estate under the alleged will had no legal efficacy.
5. The fact that the trust agreement above mentioned was executed before the alleged will was denied probate does not affect the validity of the trust evidenced by said agreement or of the trust deed made pursuant thereto, if they are otherwise valid.
6. Although said trust agreement and deed were executed by the sole heir of the decedent, and by her general guardians, while she was still a minor, yet the terms of the trust so created being unobjectionable in law, and the execution of said instruments not having been induced by fraud, and said heir, after attaining her majority and after full investigation of the trust and its administration and with full knowledge of all the facts, having executed an express written ratification of the trust agreement and deed, they are valid and binding upon her.

APPEAL from a judgment of the circuit court for Milwaukee county: JAMES WICKHAM, Judge. *Affirmed.*

The judgment appealed from was entered in a consolidated action. The *First Trust Company* commenced an action in circuit court in January, 1915, against *Alice Kane Sanderson Holden* and others for the construction of trust deeds under which it claims to be acting as trustee, instructions for future administration of the trust estate, approval of its actions as trustee, acceptance of its resignation as trustee, and the appointment of another trustee. In February, 1915, *Alice Kane Sanderson Holden,* appellant here, filed a petition in the Milwaukee county court entitled "In the Matter of the Estate of Alonzo L. Kane, Deceased," praying that the proceedings for the administration of the estate of decedent be declared null and void, that certain deeds conveying this estate in trust to the *First Trust Company* and the agreement pursuant to which such conveyance

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was made be set aside as void, and that such *Trust Company* be required to make report and account as administrator of the estate of decedent. This petition was denied in county court and appeal was taken by petitioners to the circuit court, and there the circuit court consolidated this appeal with the action of the *Trust Company*. The consolidated action was tried in the circuit court, resulting in the judgment from which this appeal is taken.

Alice Kane Sanderson Holden is the grandchild of Alonzo L. Kane, deceased, and is the only child of an only daughter of the decedent. The mother died shortly after the birth of *Alice Kane Sanderson Holden*. Alonzo L. Kane died at Milwaukee January 29, 1899, leaving an estate valued at $247,000, yielding an income of about $12,000. He disposed of this estate by an instrument purporting to be his last will. *Mrs. Holden* was his sole heir at law. At the time of her grandfather's death, her father, Henry B. Sanderson, and one Frank J. Kipp were her general guardians. Her grandfather Kane and wife desired to have her reside with them and become a member of their family, and secured her father's consent to permit her to live with them upon the understanding that she be treated as their child by them and the promise that at their death they would bestow upon her their property. She lived with her grandparents up to the time of the death of her grandfather in 1899 (he had survived her grandmother), excepting for the time she spent attending school. After her grandfather's death she attended school under her father's direction and lived at his home when not attending school. She married *Charles B. Holden* in August, 1903, having reached her majority in January, 1903.

On February 8, 1899, a petition for the probate of Alonzo L. Kane's will was filed in the Milwaukee county court. Objection to the probate of this was filed on behalf of *Mrs. Holden* by James G. Flanders, her guardian *ad litem*, on the grounds of alleged testamentary incapacity and undue in-

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fluence. On April 10, 1899, a hearing was had on the petition and the objection filed and evidence taken bearing on the mental competency of the testator to make the will, but the court did not determine the issue thus presented until June 11, 1901, when it entered an order adjudging that at the time of the instrument propounded as the last will and testament of decedent he was not legally competent to make a will and denying the application for the probate of such instrument and decreeing that the decedent died intestate. It appears that he, at the time of his death, was a resident of Milwaukee county, and that he left real and personal property within the county subject to administration. The court appointed the *Trust Company* administrator. Under the proposed instrument, if accepted as a valid will, *Alice Kane Sanderson* would have been entitled to one fourth of the income of decedent's estate during her life, and upon her death, if she left children surviving her, they would, upon conditions stated, have been entitled to a portion of the income of his estate during their lives. After the expiration of all the life annuities provided for, the income was to go to five named charitable institutions. It appears that in view of the objection to the will alleged as to decedent's mental incapacity and the validity of certain provisions in the will under the rules of law as to perpetuities and the suspension of power of alienation of real estate, all the parties interested in the probate proceedings before the will was denied probate entered into a so-called "trust agreement," which provided that the estate be conveyed in trust to the *Trust Company* and that the agreement was to take effect *inter partes* regardless of what disposition the court should make concerning the will contest. The general guardians of *Mrs. Holden,* then a minor, joined in the agreement, and in the conveyances of property pursuant to such agreement with the approval of the court. The *Trust Company* immediately took possession of the property conveyed and treated it as a trust estate.

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When *Mrs. Holden* became of age in January, 1903, she took active steps to inquire into the state of the property held by the *Trust Company* under the conveyance to it as trustee. She communicated with the officers of the *Trust Company* and inspected the documents and the accounts of the company. Shortly after she was married to *Charles B. Holden,* who assisted her in her examination of her affairs. She also employed counsel who made investigation of the transactions which finally culminated in the creation of the trust. Counsel appears to have informed her of the existing state of her property affairs and her rights in respect to affirming or repudiating the trust created by the trust agreement and the conveyance of her grandfather's estate to the *Trust Company* for the purposes therein specified. Upon being thus informed of these matters, she signed, acknowledged, and delivered a so-called ratification agreement in January, 1904, and obtained upon request by her from the *Trust Company* a loan on mortgage security upon her property in the sum of $4,200. The evidentiary facts of record in the trial in circuit court are too voluminous for restatement here; it must suffice to refer to the record in connection with the findings of fact made by the circuit court.

The trial court finds the ultimate facts involved in the transactions above referred to, so far as material to the controversies presented by the parties to this litigation. Such additional facts as are necessary to a full understanding of the issue and the decision thereof will be noticed in the opinion.

Upon the whole record the trial court held:

(1) That it was incumbent upon the county court, in probate proceedings for the probate of the proposed will of Alonzo L. Kane, deceased, to disregard any agreement of the interested parties to set aside and deny probate of his alleged will, and the validity of such purported will was required to be determined without reference to such agreement.

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(2) That the county court acted within its jurisdiction in entering the decree denying probate of the instrument propounded as the last will of Alonzo L. Kane, deceased, and that such decree is valid and binding on all parties.

(3) That the conveyance of all the interest in and title to the property of the Kane estate, made by *Mrs. Holden* when she was a minor, in which all the other parties interested in the will contest joined, to the *Trust Company* for the purposes of the trusts therein specified, was subject to disaffirmance by *Mrs. Holden* within a reasonable time after she became twenty-one years of age, and that she did not disaffirm it, but expressly ratified it.

(4) That neither *Mrs. Holden* nor her minor children are entitled to have the trust created by the conveyance of the property of the Kane estate to the *Trust Company* declared to be invalid.

(5) That the *Trust Company* in good faith accepted the conveyance of such property for the purposes of such trust and has endeavored to administer the trust according to its terms, and that it is entitled to the direction of the court for the future conduct of the trust and to have its stewardship passed upon by the court.

For the appellant *Alice Kane Sanderson Holden* there were briefs by *Kronshage, McGovern & Hannan* of Milwaukee, and oral argument by *Timothy J. Hannan* and *Francis E. McGovern.*

For the respondents there were briefs by the following named attorneys, all of Milwaukee: By *Miller, Mack & Fairchild* for the *First Trust Company;* by *Van Dyke, Shaw, Muskat & Van Dyke* for the *Milwaukee Orphans' Asylum;* and by *Curtis & Mock* for the *Wisconsin Humane Society;* and the cause was argued orally by *James B. Blake* and *George P. Miller.*

F. J. Lenicheck of Milwaukee, guardian *ad litem,* for *Charles B. Holden, Jr.,* and others, minors.

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The following opinion was filed June 19, 1918:

SIEBECKER, J. The circuit court by order consolidated the action commenced by the *Trust Company* as trustee and the appeal action commenced by *Mrs. Holden* in county court, under sec. 2792, Stats. This order stands unquestioned. The effect of such order was to merge the two actions into one, to be entitled and prosecuted as directed by the court. The old actions were thereby terminated and superseded by the new one. *Allen v. McRae,* 122 Wis. 246, 100 N. W. 12. On the face of the record and parts of the pleading it appears that the parties have retained the titles of the original actions and treated them as separate and distinct actions after consolidation. This misconception may be corrected in making the final record of the case.

The appellant, *Mrs. Holden,* contends that the orders of the county court made in the administration of the Kane estate as an intestate estate are void for want of jurisdiction because the court was erroneously induced to make such orders on the grounds that the so-called "trust agreement" was a valid one *inter partes,* and that this error caused the court to act contrary to the law governing the administration of the estate, and hence its orders in the matter were in excess of its jurisdiction and therefore wholly null and void. This appellant does not assail the order of the county court denying probate of the instrument propounded as the last will of Alonzo L. Kane, deceased. The guardian *ad litem* of the minor children does assail this order. It is necessary, under the circumstances of the issues presented, to ascertain the legal effect of this order rejecting the alleged will of Kane. The jurisdiction of the court was invoked by a proper proceeding and carried to its conclusion. The record shows that an issue was presented to the court by the filing of objections to the probate of the will by *Alice Kane Sanderson* through her guardian *ad litem.* This issue

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was tried upon the evidence and the admission of all parties named in the will to the effect that such objection was well founded. The court, acting "on said admission and on the evidence adduced and on all the files, records, and proceedings, . . . ordered, adjudged, and decreed that at the time of the execution of the said instrument propounded as the last will and testament of Alonzo L. Kane, deceased, the said Alonzo L. Kane was not legally competent to make or execute a will, and that said instrument . . . was not and is not a valid will." Under the facts shown, is this order void for want of jurisdiction, or is it erroneous but binding if not reversed or set aside? The ground upon which to test the validity of this order is clearly stated in the recent case of *Cline v. Whitaker,* 144 Wis. 439, 129 N. W. 400:

"In dealing with such a matter as this the distinction between total want of jurisdiction; absolute absence of power, and want of jurisdiction, in the sense the term is commonly used, characterizing judicial action which is so highly erroneous as to be without legal justification, yet not, as has been said, beyond competency to err,—must be kept in mind. The two phases of jurisdiction were discussed at considerable length in *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909, one being termed want of power and the other inexcusable departure from established principles;—a gross misuse of power. The former is a usurpation. The resulting judgment or order is totally void. The latter is mere error. The resulting judgment is valid, till avoided in proceedings to that end."

No party challenges the power of the county court to exercise its jurisdiction for the probate of the Kane will or granting administration of his estate in case of intestacy, and all parties except the guardian *ad litem* concur in the view that the order denying probate of the proposed will is valid. The guardian's position is in effect that this order is void because the county court denied probate to the proposed will upon the evidence adduced and pursuant to admissions of the interested parties that the objections were true, and that

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such admissions were made pursuant to an agreement made out of court for the creation of the trust embodied in the "trust agreement," and relies upon the cases of *Will of Dardis,* 135 Wis. 457, 115 N. W. 332; *Will of Rice,* 150 Wis. 401, 136 N. W. 956, 137 N. W. 778; *Estate of Staab,* 166 Wis. 587, 166 N. W. 326. In making this order the court unquestionably had jurisdiction of the subject matter. The record discloses a proper proceeding and an inquest upon the evidence to determine Kane's mental competency to make the will, and, though the court had before it the admission of the parties as to his mental incapacity and approved the so-called "trust agreement," it does not follow that the order denying probate to the alleged will was not a proper and legitimate exercise of its judicial power, based upon good and sufficient grounds, to deny probate to the proposed will. It is considered that the trial court correctly held that this order and decree denying probate to the proposed will is valid and binding upon all the parties and that the county court had jurisdiction to administer the Kane estate as intestate.

Since the Kane estate is an intestate one, it follows as a legal consequence that *Mrs. Holden,* as the only heir at law of Mr. Kane, was the sole owner thereof, and that title to the real estate became vested in her at the death of her grandfather, and that she had a beneficial interest in his personal property that remained after payment of his debts and expenses of administration. It appears that the part of decedent's personal property that remained after payment of his debts and expenses of administration is in the trustee's hands under the trust agreement and that the trustee is ready and willing to account for the same. It is most vigorously asserted and claimed that all of the county court's orders made in the course of administering the Kane estate as intestate are void because the court's action was based on its approval of the "trust agreement" and the trust deed

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made pursuant thereto. This claim is grounded on the contention that the proceedings show that the *Trust Company* as administrator did not in fact take charge of the property as administrator, but held and possessed it as trustee under the trust deed and agreement, thus disregarding and evading the law governing the distribution of intestate estates, and that such a course of action is against the public policy of the state, rendering all the orders of the county court in the course of such administration void for want of power to make them. The record does not show that the *Trust Company* received the property of the Kane estate as trustee pursuant to a decree of the county court. It is manifest from the records that the county court did not undertake to decree a distribution of the estate in the form of the trust evidenced by the trust agreement and trust deed. The most that can be said is that the court recognized the fact that the parties had, pursuant to such trust agreement, put the *Trust Company* in possession of the property as trustee, and that the court therefore did not decree a distribution thereof in conformity to the law for the distribution of intestate estates. The court properly appointed the administrator. In the course of the administration it made due examination of its accounts and found that it had no property in its possession as administrator, and hence discharged it as administrator of the estate. There is no room for dispute but that the court could act judicially as to all these steps and that the subject matter involved was within its jurisdiction. The argument is made that, though these administration proceedings and orders therein appear regular and proper on their face, they were in fact induced by and were intended to give sanction to the trust agreement as a proper and valid disposition of the Kane estate, and that the court in this way attempted to adjudge a distribution of this intestate estate without authority and power in law. This claim, however, does not reach the question of the power of the court to make orders in the administration proceeding. The orders

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of the court having been made within the administration proceeding of which it had jurisdiction, it follows that the court had legal competency to make them no matter how grievously it may have erred in law in the exercise of its powers, and that they are effective and bind all parties interested in the estate. The fact that the court did not decree a distribution of the Kane estate as intestate under the law is an error within its jurisdiction and does not render its action void for want of power.

We have shown above that the will was denied probate and that Mr. Kane in fact died intestate. Under these circumstances the right, title, and interest to his property devolved upon *Mrs. Holden* at the time of his death, and vested in her all the rights of an owner subject to his debts and the expenses of administration. From this it results that the proceedings had in county court to transfer any possible interest of the unborn children of *Mrs. Holden* which they might have had under the proposed will of Mr. Kane have no legal efficacy and were for naught, so we need not further consider them. Since Mr. Kane in fact made no will, *Mrs. Holden,* immediately upon his death, was empowered in law to make any legal disposition of the property of the estate, including such a one as is evidenced by the trust agreement and deeds. If Mr. Kane had, in fact, executed a valid will, then this trust agreement for a disposition of his estate would have been void upon the authority of *Will of Dardis,* 135 Wis. 457, 115 N. W. 332; *Will of Rice (Cowie v. Strohmeyer),* 150 Wis. 401, 136 N. W. 956, 137 N. W. 778; *Estate of Staab,* 166 Wis. 587, 166 N. W. 326.

Mrs. Holden, then a minor, executed the trust agreement and deed, as did her general guardians. The fact that the will had not been denied probate when the negotiations were had for the creation of this trust cannot affect its validity if it is otherwise valid and she was not induced to enter the trust agreement through fraud.

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The provisions and terms of the trust created are unobjectionable in law and we perceive nothing therein to make them invalid. We have, then, a trust agreement and deed valid on their face and subject only to be impeached by any fraud perpetrated upon *Mrs. Holden* which induced her to execute them, or, if they are not infected by such a fraud, then their legal efficacy is subject only to her alleged right to disaffirm them when she arrived at her majority. An examination of the records and evidence bearing on the transaction which resulted in the making and executing of the trust agreement and the deed pursuant thereto leads us to the conclusion that the circuit court's holding that they are valid is correct. The evidence indicates that *Mrs. Holden* was fully informed of the legal effect of the agreement and deed and that she comprehended their significance. Her acts immediately upon her attaining majority show plainly that she had theretofore fully understood the purpose and effect of the trust arrangement. It is evident that this disposition of her grandfather's estate was in accord with her wishes, under the facts and circumstances presented to her in connection with the will contest and the settlement of the controversies raised thereby. She must be held bound thereby, upon the condition, however, that she had the right to disaffirm the trust when she arrived at the age of twenty-one years. Upon the question of *Mrs. Holden's* ratification of the trust thus created by her and the other parties thereto the circuit court found as facts:

"(7) That on or about the 14th day of January, 1904, said petitioner, *Alice Kane Sanderson Holden,* who had then become of lawful age, with her husband, *Charles B. Holden,* for a valuable consideration, after consultation with her attorney, without any fraud being practiced upon her, and with full knowledge of all the material facts, made, executed, and delivered to said trustee and to certain other parties interested in said trust, a written instrument ratifying said written instrument of June 11, 1901, said trust deed, and the acts of the guardian in relation thereto."

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This ratification, so executed in writing, is duly signed by her and her husband in the presence of witnesses, one of them her attorney, Mr. J. W. Bass, who was then acting for her and had advised and consulted with her in her investigation of the trust and its administration by the *Trust Company*. The evidence discloses that she had become fully informed of the contents of the trust agreement and deed, that she fully understood them, and had detailed knowledge of the trustee's doings and the state of the property embraced in the trust. The evidence is clear and well nigh conclusive in support of the trial court's finding of facts on this issue in the case. We are persuaded that *Mrs. Holden* executed the ratification instrument after she had acquired full knowledge of the purposes and conditions of the trust as created by her during her minority, that she was fully informed before the execution of the ratification instrument of the condition of the property held in trust and of the way it had been administered by the trustee up to that time, and that she was not induced to execute the ratification agreement by any misrepresentation of the actual state of affairs concerning the terms of the trust or of the trustee's administration thereof. It must be held that she is bound by her express ratification of the trust agreement and deed. The effect of such ratification is that the trust created in 1901 and the *Trust Company's* acceptance thereof as trustee is binding on all the parties, and that *Mrs. Holden* and her children have established no ground for the relief demanded in this action.

The points discussed by counsel respecting the question of estoppel and the statutes of limitation need not be considered to reach a final and complete determination of all the issues raised by the pleading, and hence discussion of them is omitted.

The circuit court's direction that the trustee be authorized, until further order of the court, to pay the annuity provided for *Louise Warren* out of the *corpus* of the trust estate, is

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not challenged nor argued in the brief of counsel on this appeal. It will therefore not be considered by the court.

By the Court.—The judgment appealed from is affirmed; the *First Trust Company* to recover its costs and disbursements in this court from *Alice Kane Sanderson Holden.*

ESCHWEILER, J., dissents.

The appellant *Alice Kane Sanderson Holden* moved for a rehearing.

In support of the motion there was a brief by *McGovern, Hannan & Reiss* of Milwaukee.

In opposition to the motion there was a brief on behalf of the respondent *First Trust Company* by *Miller, Mack & Fairchild* of Milwaukee.

The motion was denied, with $25 costs, on September 14, 1918.

RYAN, Plaintiff in error, vs. THE STATE, Defendant in error.

May 21—September 14, 1918.

Judicial notice: Boundaries of political subdivisions: Intoxicating liquors: Unlawful sale: Evidence as to time: Federal permit: Appeal: Harmless errors.

1. The courts will take judicial notice of public records of the state defining the boundaries of its various political subdivisions.
2. Although a county map or atlas showing, as part of a village, a platted area adjacent to but outside of its original boundaries is sufficient to raise a question as to the exact boundaries, that question must be determined by the public records; and the courts will take judicial notice that such boundaries have not been changed in the manner provided by statute since the original incorporation of the village.
3. Where complaint was made on December 16th that defendant unlawfully sold liquor on the 14th, evidence that a man living seven miles away went to a village on December 14th and secured from a physician a prescription for a pint of whisky, and that he took the prescription to defendant's drug store in

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the village and there secured the whisky, warranted an inference by the jury that the entire transaction took place on December 14th.

4. Under sub. 2, sec. 1565*c*, Stats., evidence that at the time in question the defendant had a permit or special tax stamp from the federal government authorizing him to engage in the occupation of selling spirituous or fermented liquors, is *prima facie* evidence of an unlawful sale at that time.
5. Where, upon the evidence, the jury could have failed to convict the defendant only by wantonly violating their official oaths, alleged errors in the charge to the jury cannot be held prejudicial.

ERROR to review a judgment of the county court of La Fayette county: J. B. SIMPSON, Judge. *Affirmed.*

Thomas S. Ryan was convicted in the county court of La Fayette county for illegally selling liquor in dry territory, contrary to the provisions of sec. 1565*c* of the Statutes. The case is brought here for review upon a writ of error sued out by said *Ryan,* hereinafter called the defendant.

For the plaintiff in error there was a brief by *Fiedler & Fiedler,* attorneys, and *Calvert Spensley,* of counsel, and oral argument by *T. M. Priestley* and *E. C. Fiedler,* all of Mineral Point.

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

The following opinion was filed June 19, 1918:

OWEN, J. The first contention of the defendant is that the state failed to prove that the unlawful sale of liquor for which he was convicted occurred in La Fayette county. The evidence shows that the sale took place in the village of Blanchardville, but there was no proof that the village of Blanchardville was located in La Fayette county. Courts of this jurisdiction take judicial notice of the location of the various political subdivisions of the state. In *Huey v. Van*

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Wie, 23 Wis. 613, judicial notice was taken of the fact that the village of Madison was in Dane county. In *Davis v. State,* 134 Wis. 632, 115 N. W. 150, this court took judicial notice that the city of Waukesha was within the territorial boundaries of the municipal court for the Eastern district of Waukesha county. It necessarily follows that, when the exact boundaries of the various political subdivisions of the state come in question, the court must take judicial notice of such public records of the state as define such boundaries.

An inspection of the records relating to the incorporation of the village of Blanchardville on file in the office of the circuit court for La Fayette county reveals the fact that, as originally incorporated, the entire area included within said village is in La Fayette county. We also take judicial notice of the fact that the boundaries of said village have not been changed in the manner provided by statute since the original incorporation thereof. It appearing, therefore, that no part of the village of Blanchardville is located outside of La Fayette county, and the proof being undisputed that the sale of liquor took place in the village of Blanchardville, we must hold that the venue was competently proved.

Upon the argument attorneys for defendant exhibited to the court a county map or atlas, upon which a small platted area seeming, according to such map, to constitute a portion of the village of Blanchardville, extended into Iowa county. The platting of lands lying outside the limits of, but adjacent to, incorporated villages and cities by enterprising property owners is not infrequent, and while the presentation of the map was sufficient to raise a question as to the exact boundaries of the village of Blanchardville, the question thus raised must be determined by the public records defining the exact boundary lines of said village.

In this connection it is proper to call attention to the provisions of sec. 4618 of the Statutes, which provides that "Offenses committed on the boundary lines of two counties or within one hundred rods of the dividing line between

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them may be alleged in the indictment or information to have been committed in either of them, and may be prosecuted and punished in either county." By virtue of this provision of the statutes, unless the boundaries of the village of Blanchardville extended more than 100 rods into Iowa county the proof was sufficient to confer jurisdiction upon the county court of La Fayette county.

The information charged the defendant with having made the unlawful sale of liquor on the 14th day of December, 1916. It is contended that no proof was made of the date on which the liquor was sold. The evidence shows without dispute or contradiction that Peter Paulson lived in the town of York, seven miles from the village of Blanchardville; that on the 14th day of December, 1916, he went to the village of Blanchardville and secured a prescription from Dr. McDermott for a pint of whisky; that he took the prescription to the defendant's drug store and secured the liquor from the defendant; that the defendant did not have in his employ a registered pharmacist nor an assistant registered pharmacist, and was not authorized to sell liquor for medicinal purposes in the village of Blanchardville, as provided in sec. 1548*a* of the Statutes. Complaint was made against him for such unlawful sale on the 16th day of December, 1916. It is the contention of the defendant that the evidence does not show that, after securing the prescription from Dr. McDermott on the 14th day of December, 1916, Paulson did on that day take the same to the defendant's drug store and secure the whisky. We think the evidence and the circumstances fully warrant an inference which might properly be drawn by the jury that the prescription was "filled" on the day it was written. The suggestion that a man in quest of liquor, living seven miles from town, came into town, secured a prescription, put it in his pocket, took it home, returned to town a day or two later and then requisitioned the whisky upon the prescription, is not forceful. The evidence showing that the prescription was writ-

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ten on the 14th day of December, and that it was taken to the drug store of the defendant and there "filled," the inference fairly follows that the entire transaction took place on that day. But independent of these considerations, sub. 2 of sec. 1565*c* of the Statutes makes the existence or the issuance of any permit or special tax stamp from the United States government, authorizing or permitting any person to engage in the occupation of selling distilled, spirituous, or fermented liquors at the time and place of any alleged violation of the excise law, *prima facie* evidence that such person is vending, selling, dealing or trafficking in or, for the purpose of evading the laws of this state, giving away spirituous, malt, ardent, or intoxicating liquors or drinks, contrary to sec. 1565*c*. It was shown at the time of the alleged violation that the defendant had a permit or special tax stamp from the United States government permitting him to engage in the occupation of selling, etc., spirituous or fermented liquors. This constitutes a *prima facie* case against the defendant without any further proof.

A reversal is urged because of alleged errors committed by the trial judge in his charge to the jury. We have examined the charge and do not deem the criticisms thereof worthy of discussion. In any event, nothing short of prejudicial error can work a reversal of the judgment, and no such error has been found. Sec. 3072*m*; *Adams v. State*, 164 Wis. 223, 159 N. W. 726; *Alsheimer v. State*, 165 Wis. 646, 163 N. W. 255. The evidence is undenied that the defendant sold a pint of whisky to Peter Paulson, who paid him seventy-five cents therefor. Only by wanton disregard of their official oaths could the jury have failed to convict him. Even granting criticisms of counsel to be academically correct, which we do not, prejudicial error does not follow.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, without costs, on September 14, 1918.

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STATE EX REL. DOWNEY-FARRELL COMPANY vs. WEIGLE, as Dairy and Food Commissioner.

May 21—September 14, 1918.

Trading stamps: Regulation by state: Coupons packed with oleomargarine: Interstate commerce: Police power: Authority to "issue" slips with "stated cash value:" Redemption only by person issuing: Trading-stamp company as agent for redemption: Statute construed.

1. The shipment, by a manufacturer located in another state, to jobbers within this state, of oleomargarine wrapped and packed for shipment in accordance with the requirements of the federal law, the placing in each box so packed of a "dealer's coupon" entitling the person or jobber to whom such original shipment is made to receive in cash an amount dependent upon the number of pounds of oleomargarine in the box, and any redemption of such coupons, either by the manufacturer or by any third person whom it may designate, are all parts of one transaction of interstate commerce, which is subject only to federal regulation and hence is not governed by sec. 1747*m*, Stats. 1917 (ch. 480, Laws 1917).
2. There is in such case no right of the state to inspect or regulate said article of commerce in order to protect the health or morals of its citizens, and no other feature which might bring it within the reasonable exercise of the police power of the state to prevent fraud.
3. The final clause in sub. 1, sec. 1747*m*, Stats. 1917 (providing that any manufacturer, packer, or dealer may "issue," with the sale of any goods, a slip, ticket, or check which shall bear upon its face a stated cash value and shall be redeemable only in cash "and only by the person, firm, or corporation issuing the same"), permits any manufacturer, packer, or dealer, whether within or without the state, to place so-called "clerk's" or "consumer's" coupons, redeemable in cash only and by the person so issuing them, within any original carton, package, or box intended for original shipment, although such original packages are not sold by him to the ultimate consumer.
4. It is not necessary that the redemption of such cash coupons shall be by someone within this state; but a provision in the coupons that they shall not be sent to the corporation issuing them but shall be redeemed only by another corporation, which is engaged in the trading-stamp business and must be regarded more as an independent contractor than as an

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agent, servant, or employee of the issuing corporation, is in violation of the statute.

5. The requirement that each coupon shall bear on its face a "stated cash value" should be reasonably construed, and is sufficiently complied with where a definite cash value is stated on the face of the coupon, although on the back thereof is the further statement, signed by the issuing corporation, that it is redeemable only by another corporation "as our agent according to terms of its catalog in effect at time of redemption, except that in any state or locality where redemption in goods is prohibited or requires payment of license or tax, not required for cash redemption, this coupon will be redeemed in cash only, and is void wherever prohibited."

6. There is also a sufficient compliance with said requirement as to a "stated cash value," where, with no purpose to deceive and as a matter of convenience only, the coupon states the amount of the sale and indicates that the cash value of the coupon itself is a certain percentage of that amount.

THIS is an original proceeding in this court wherein the plaintiff prays that the defendant, as dairy and food commissioner of the state of Wisconsin, be enjoined and restrained from a threatened enforcement, as against the plaintiff, of the provisions of ch. 480, Laws 1917 (Stats. 1917, sec. 1747*m*).

An answer was interposed to the complaint and the issues of fact thereby raised were referred by this court to the Hon. A. G. ZIMMERMAN, county judge of Dane county, as referee to take testimony, which he did, and thereupon made and filed his findings of fact herein.

The material facts necessary for consideration in this case as they appear from these findings are substantially as follows:

The plaintiff is a Delaware corporation doing business in Chicago, Illinois, and has not taken out a license under sec. 1770*b*, Stats., to do business in this state. It makes a high grade of oleomargarine and sells the same at a uniform price to jobbers all over the country. In compliance with the federal law this oleomargarine is put up at the factory

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in Chicago in weights of one, two, and five pounds, respectively, each such weight being wrapped in parchment paper, inserted in pasteboard cartons, which are then closed and packed in boxes containing generally either ten, twenty, twenty-four, thirty, sixty, or one hundred pounds of such packages and shipped in such boxes to the jobbing trade all over the United States. Such boxes of original shipment, unopened, are sold by jobbers to retail dealers or hotel keepers. No sales permitted of less than ten pounds. All sales at retail are required to be from such boxes of original shipment and such cartons are not to be removed therefrom until the sale at retail is made to the consumer.

At the time of the packing of these pasteboard cartons at the place of business in Chicago there is inserted in each of them what is designated as a consumer's coupon, substantially as follows:

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The form here given is such as is inserted in the one-pound carton. The only change in the other consumers' coupons is the insertion of the larger amounts allowed for the redemption of the respective three- and five-pound weights.

There is also attached to each carton, in such manner that it is detachable upon the opening of the carton, another coupon which in effect promises the clerk or person making the sale to the consumer a certain payment in cash redeemable in the same way. In each box as packed for shipment at plaintiff's place of business there is inserted an additional and separate coupon, known as the dealer's coupon, entitling the person or jobber to whom such original shipment is made to also receive a cash payment, the amount thereof dependent upon the number of pounds of oleomargarine in each such box, and substantially in form as on page 23.

The United Profit Sharing Company is a Delaware corporation that has an office in the city of New York and not elsewhere. It has not been licensed to do business in Wisconsin since 1915. Prior to December, 1917, the plaintiff and the United Profit Sharing Company did business under a contract of November, 1915, by which coupons then being issued on behalf of the plaintiff were redeemable in merchandise by such United Profit Sharing Company.

After the determination by this court of the *Trading Stamp Cases (State ex rel. S. & H. Co. v. Weigle)*, 166 Wis. 613, 166 N. W. 54, involving the construction of the same statute as here involved, a new contract in writing was entered into between such corporations which in substance provided that the United Profit Sharing Company was appointed sole and exclusive agent to redeem in cash for plaintiff and in its name all of its coupons in the state of Wisconsin with the sale of its goods; the plaintiff to refund monthly to the other company whatever amounts it paid for such redemption, together with a fee for the services as such agent of $2 for each 1,000 of such coupons as were

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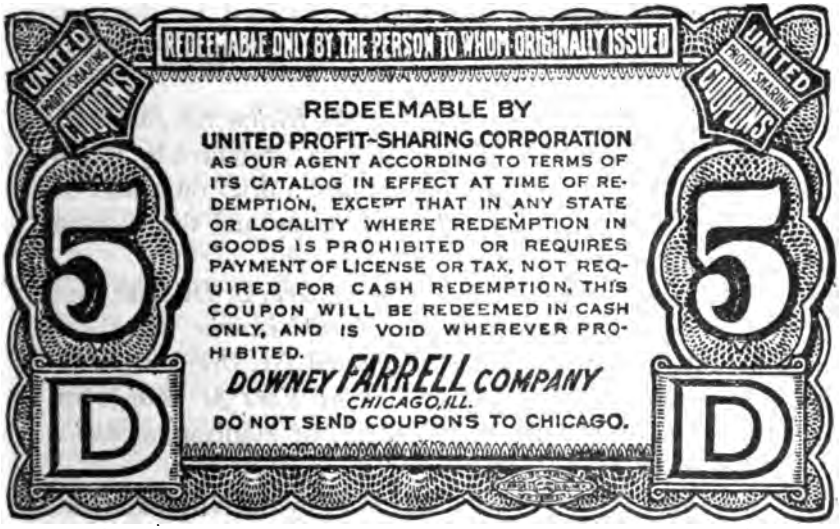

issued by plaintiff and redeemed by the other company and when returned to the plaintiff properly bundled. The United Profit Sharing Company was also obligated to have the

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coupons printed for plaintiff on a special kind of paper, charging at the rate of sixty and seventy-five cents per thousand for the respective forms of coupons. The referee also found that an oral contract was made at the same time, substituting the new written contract for the old one, and that there was no other contract or agreement between those two on this subject matter than as herein indicated.

It was further found that the plaintiff used these coupons for the sole purpose of advertising its product and not otherwise; that the cash redemption by the United Profit Sharing Company is done for the reason that that company can do it cheaper and give better service than if done by the plaintiff itself. Catalogs had been printed prior to the enactment of the law in question which had been distributed by the United Profit Sharing Company both in this state and in other states where no such prohibitions were in force, specifying the conditions upon which, and the kind and nature of the merchandise which could be obtained for the coupons as formerly used and issued by the plaintiff as well as by other concerns.

For the plaintiff there was a brief by *Richmond, Jackman, Toebaas & Wilkie* of Madison, and oral argument by *Ralph W. Jackman.* The same attorneys filed a brief on behalf of the Manufacturers & Retailers Company and the Indiana Condensed Milk Company.

A brief was filed by *E. H. Bottum, Geo. B. Hudnall,* and *Walter Drew,* all of Milwaukee, as *amici curiæ,* and there was oral argument by *Mr. Hudnall* and *Mr. Drew.*

A separate brief was also filed by *Ezra M. Kuhns* of Dayton, Ohio, and *Sanborn & Blake* of Madison, as *amici curiæ.*

For the defendant there was a brief by the *Attorney General, Walter H. Bender,* deputy attorney general, and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Bender* and *Mr. Brossard.*

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The following opinion was filed June 19, 1918:

ESCHWEILER, J. Ch. 480, Laws 1917, provides:

"Section 1747*m*. 1. No person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, firm, corporation, or association within this state, in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device, except that any manufacturer, packer or dealer may issue any slip, ticket, or check with the sale of any goods, wares or merchandise, which slip, ticket or check shall bear upon its face a stated cash value and shall be redeemable only in cash for the amount stated thereon, upon presentation in amounts aggregating twenty-five cents or over of redemption value, and only by the person, firm or corporation issuing the same. . . ."

Immediately upon its passage the constitutionality of it was attacked in a proceeding in this court, and it was there held to be a proper exercise of the legislative power. *Trading Stamp Cases,* 166 Wis. 613, 166 N. W. 54. What was there held as to the evident scope and purposes of the act need not be here repeated.

The plaintiff contends that as packer or manufacturer of the oleomargarine its method of business is a proper compliance with the provisions of this chapter; that the three respective forms of coupons to dealers, clerks, and consumers are issued, within the language of the statute, when they are respectively packed in the cartons and boxes at plaintiff's place of business in Chicago before shipment. It also contends that the transaction, so far as it concerns the shipment direct to the jobber and receipt by him and redemption by it, through its intermediary the United Profit Sharing Company, of the so-called dealer's coupon, is a

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transaction of interstate commerce and beyond interference with or regulation by the state.

It furthermore contends that it may lawfully, under the statute in question, make the United Profit Sharing Company its sole and exclusive agent for the cash redemption of such coupons.

The defendant expressly disclaims any intention of enforcing the statute in question so as to in any way interfere with interstate business, but contends that both the issuing and redeeming of such coupons can only lawfully be done by a packer, manufacturer, or dealer who is within the state of Wisconsin; and secondly, that coupons such as are here under consideration, appearing on their face to be redeemable only by some third person, cannot be lawfully issued.

In view of the nature of the requirements of the federal law regulating the manufacturing and dealing in oleomargarine and the manner in which such product is packed and shipped, as appears from the facts in the record before us, we are satisfied that in the transactions between the plaintiff in this case and the jobbers within this state to whom shipments of the product are made in the boxes of original shipment the placing of the dealer's coupon therein, entitling such jobber to a cash payment, and any redemption thereof, are all parts of one commercial transaction. *Loverin & Browne Co. v. Travis,* 135 Wis. 322, 331, 115 N. W. 829; *F. A. Patrick & Co. v. Deschamp,* 145 Wis. 224, 228, 129 N. W. 1096. Such shipments being from without the state, they are in the domain of interstate commerce and subject only to federal regulation; and therefore neither the defendant as a state officer nor this court has any power or right to interfere with, control, or regulate the issuing of such dealer's coupons, the manner and form in which they are being issued and delivered, or the redemption thereof either by the plaintiff itself or by any third person whom it may designate. Such matters are of contract between the

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shipper and the person to whom the shipment is made and not subject to state regulation. *Greek-American S. Co. v. Richardson D. Co.* 124 Wis. 469, 474, 476, 102 N. W. 888; *Schollenberger v. Pennsylvania,* 171 U. S. 1, 18 Sup. Ct. 757; *Rosenberger v. Pacific Exp. Co.* 241 U. S. 48, 36 Sup. Ct. 510.

There is no situation here of possible right of the state to inspect or regulate this article of commerce in order to protect the health or morals of its citizens or of any feature which might bring it within the reasonable exercise of the police power of the state to prevent fraud. The rulings of the United States supreme court, therefore, upholding the right of states to control and regulate the sale of foreign securities, as in the so-called blue-sky laws (*Hall v. Geiger-Jones Co.* 242 U. S. 539, 37 Sup. Ct. 217), or the moving picture film censorship case (*Mutual Film Corp. v. Industrial Comm.* 236 U. S. 230, 35 Sup. Ct. 387), have no application here.

Considering the well known and general nature of the business of a manufacturer or packer, which is well exemplified under the facts shown in this case; the aims and purposes of the statute itself as appears on its face; and from the declaration already made by this court with reference to it in the *Trading Stamp Cases (State ex rel. Sperry & Hutchinson Co. v. Weigle),* 166 Wis. 613, 166 N. W. 54, we are led to the conclusion that the word "issue," as used in the final clause of the first subdivision of the section before us [sec. 1747*m,* Stats. 1917: ch. 480, Laws 1917], is intended to permit and authorize a manufacturer or packer, such as the plaintiff in this case, whether within or without the state, to place coupons such as we have here before us, but when redeemable in cash only and by the person so issuing them, within any original carton, packages, or boxes intended for original shipment, although such original packages may not be sold directly by him to the ultimate consumer.

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We think it apparent from the face of the statute itself and in the light of the common knowledge of the way such commerce is now conducted, that the legislature intended to exclude any interference by this law with what might be within the field of interstate commerce, and that when it expressly recognizes, as a legitimate transaction, the issuing by any manufacturer, packer, or dealer, to the purchaser, of a cash redemption coupon, it did not intend to limit such transactions to manufacturers, packers, or dealers who are within the state only. The use of the term "within the state" in the first portion of the first paragraph of this section and its omission in the provision of the same paragraph with which we are here concerned, and the word "any" preceding the words "manufacturer, packer or dealer," indicate plainly that the legislature did not intend to inhibit the right to issue coupons to manufacturers or packers without the state who ship to dealers or consumers within, nor that the redemption of any such cash coupon must be done by someone within the state, necessarily.

The provisions, however, embodied in the coupons before us, that they shall not be sent to plaintiff in Chicago and shall be redeemed only by the United Profit Sharing Company, are within the condemnation of this statute both by the letter thereof and by the interpretation given to it in the former decision of this court, *supra*, and to similar statutes in the cases in that decision cited. Under the facts as are here presented, the United Profit Sharing Company is a company engaged in the trading-stamp business and must be considered more as an independent contractor with the plaintiff than as such an agent, servant, or employee through whom the plaintiff as a corporation must necessarily perform its lawful transactions. So far, therefore, as the plaintiff issues coupons redeemable in cash but only through such a corporation as the United Profit Sharing Company appears to be, it is violating ch. 480, Laws 1917, and is not entitled

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to any restraining order from this court as against the defendant in that regard.

Some suggestion is made that the form of the coupon as it appears in the statement of facts is not sufficiently definite to meet the requirements of the statute that it shall bear upon its face a stated cash value. We think, however, that such term "stated cash value" should be given a reasonable construction and that the language in these coupons is within such reasonable construction and does show a stated cash value.

It was suggested on the argument, although not applicable to the facts presented in the record here, that coupons are and may be issued by others in such manner that there is designated on such coupons the amount of the sale together with a recital that the allowance was to be a certain named percentage thereof, without expressly stating upon the face of such coupon the result to be arrived at by computation of the given percentage upon the given amount, and that such form of coupon would not be a proper compliance with the "stated cash value" provision of the statute. The adoption, however, of a reasonable construction of this language would make that certain within the meaning of this clause which can be easily and by the ordinary individual rendered certain, and that where there is no purpose of deception, but as a matter of convenience only there may be required some slight mental arithmetical process on the part of the purchaser in order to ascertain exactly the amount which he is entitled to receive, there is no violation of the statute, any more than a coupon presented to the customer indicating on its face that it covered two transactions, in one of which he was entitled to ten cents and another in which he was entitled to fifteen cents, would need to have the addition perfected on its face in order to show to him that he was entitled to twenty-five cents.

It follows from what has been said that the plaintiff is

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entitled to proceed unmolested by defendant so far as the so-called dealer's coupons are concerned which are issued by him and placed in the original box at Chicago in which the shipments are made to the jobber or original purchaser within the state of Wisconsin, whether such coupons are to be redeemed by plaintiff personally or through the United Profit Sharing Company; that the plaintiff is not authorized or warranted to issue consumer's or clerk's coupons for use within this state which are redeemable by any such independent contractor as the United Profit Sharing Company appears to be, or other than by itself; that it may lawfully place within such original packages as are the one, two, and five-pound cartons used by it in its shipment of oleomargarine the clerk's or consumer's coupons when such bear upon their faces a stated cash value and are redeemable in cash only by the plaintiff itself.

By the Court.—Let judgment be entered in accordance with this opinion. Defendant to recover the following costs to be taxed against the petitioner:

Referee's fees, seven days at $25	$175 00
Stenographer's fees	47 00
Court commissioner's fees	17 40

Fees of clerk of supreme court, to be taxed.

No other costs to be recovered.

OWEN, J., took no part.

A motion for a rehearing was denied, without costs, on September 14, 1918.

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WISCONSIN TRUST COMPANY and another, Respondents, vs. MUNDAY and others, Appellants. [No. 1.]

MUNDAY and others, Appellants, vs. WALTER and others, Respondents. [No. 2.]

April 5—October 8, 1918.

Foreign corporations: Right to acquire property in this state: Interstate commerce: Conveyances wholly void: Validation: Statutes construed: Public policy: Annulment of deed at suit of grantor: Estoppel: Ratification: Covenants of warranty: Mortgage by grantee corporation: Ordinary care by mortgagee as to title: Constitutional law: Delegation of legislative power: Option to enforce contract: Impairing obligation of contracts: Privileges and immunities: Cancellation of conveyances: Return of consideration.

1. Sec. 1770*b*, Stats., prohibiting unlicensed foreign corporations (with certain exceptions) from transacting business or acquiring, holding, or disposing of property in this state, applies not only to bilateral and executory contracts, but also to executed contracts and unilateral instruments of transfer, including deeds or conveyances of land in Wisconsin given pursuant to antecedent contracts, written or oral.
2. Conveyances in February, 1913, of real property located in this state to a foreign corporation which had not complied with sec. 1770*b*, Stats. 1911, were absolutely and wholly void as to said corporation and its grantees, even though the deeds were given pursuant to and as part of a contract negotiated and executed by the parties outside of this state, and as a part of the transaction the Wisconsin owner of the real estate received shares of stock in said foreign corporation.
3. The contract in such case was not one relating to interstate commerce, since that implies as a necessary element the transportation of goods between states.
4. Compliance with the statute by the grantee corporation in 1915 did not validate such deeds executed in 1913. [What effect, if any, the enactment of ch. 212, Laws 1913, amending sec. 1770*j*, Stats., had as to title attempted to be conveyed to corporations which complied with sec. 1770*b* after the enactment of said sec. 1770*j* (by ch. 142, Laws 1911) and prior to the passage of said ch. 212, Laws 1913, is not determined.]
5. By the enactment of ch. 211, Laws 1917, sec. 1 of which amends sub. 2, sec. 1770*b*, and sub. 1, sec. 1770*j*, the legislature intended only to exempt from the provisions of sec.

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1770*b* "corporations not organized or conducted for profit," and to confirm and validate titles theretofore attempted to be acquired by exempted corporations. The words "before the passage of this section," having been a part of sec. 1770*j* as originally created (by ch. 142, Laws 1911), refer, when repeated in the amended section, to the original enactment of said sec. 1770*j*, and not to the passage of sec. 1 of the amending act of 1917. VINJE, KERWIN, and ESCHWEILER, JJ., dissent.

6. By the repetition of language in an amending statute which provides that the original section shall be "amended to read as follows," such repeated language is not repealed and reenacted, but remains in force as of the time of the original enactment, in the absence of a clearly expressed legislative intent to the contrary.

7. Sec. 1770*b*, Stats., is a declaration of a public policy of this state, its purpose being to compel foreign corporations to comply with its terms before transacting business in the state or attempting to acquire or hold property situated within the state. Annulment or cancellation of contracts which are void under that section is therefore not a matter of purely private or personal interest, and will not be denied merely upon the ground that it would be inequitable or that the party seeking such relief is estopped to claim the benefit of the statute. So *held* in a case where, pursuant to a contract between the parties, real property located in Wisconsin was conveyed by the Wisconsin owner, with special covenant of warranty as against any person claiming through or under him, to a foreign corporation which had not complied with said sec. 1770*b*, and as part of the transaction the grantor became a stockholder in said corporation and then, with full knowledge that the corporation was about to deal with the title to the property conveyed, stood by and permitted the title to be pledged for money borrowed.

8. A covenant of warranty contained in a deed made void by sec. 1770*b*, Stats., cannot be held to be a ratification of the making of the deed itself, nor to be an election to affirm, and a validation of, a contract the making of which and the execution and delivery of the deed constituted a single transaction, especially where, as in this case, the grantors thereafter moved with promptness to assert the invalidity of the deed and to recover the property conveyed.

9. The fact that the transaction by which real property in Wisconsin was conveyed to a foreign corporation contemplated that it should be conveyed by such corporation (a dealer in real estate) to others, is not significant upon the question of the validity of the conveyance under sec. 1770*b*, Stats.,—the

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purpose of every conveyance being to enable the grantee to deal with the property as his own.

10. The creation of sec. 1770*j*, Stats., by ch. 142, Laws 1911, granting relief to corporations which had inadvertently or mistakenly supposed that sec. 1770*b* was not applicable to their particular situation but which had complied with its provisions prior to the passage of said ch. 142, did not indicate a purpose to change the legislative policy of the state or to relieve foreign corporations thereafter transacting business or acquiring property within this state from complying with said sec. 1770*b*.

11. Conveyances of real property located in this state to a foreign corporation which had not complied with sec. 1770*b*, Stats., and which was not relieved from its disability by sec. 1770*j*, being void and not voidable only, it is immaterial whether or not persons subsequently loaning money upon the faith of such conveyances failed to exercise ordinary care with respect to the ownership of the property.

12. Under the provision in sub. 10 of sec. 1770*b*, Stats., to the effect that every contract made by a foreign corporation in violation of that section, when affecting its personal liability or relating to property within this state, "shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them," the contract does not become void or not at the election of the other party, but, so far as it is a contract in favor of or on behalf of the offending corporation, is expressly made void by the terms of the statute; and the statute is therefore not unconstitutional on the ground that it delegates to a private individual the legislative power to impose or not, at his election, a penalty for the doing of the prohibited act. *Duluth M. Co. v. Clancy*, 139 Wis. 189, 194; *Hanna v. Kelsey R. Co.* 145 Wis. 276; and *Lanz-Owen & Co. v. Garage E. M. Co.* 151 Wis. 555, explained.

13. As construed by this court secs. 1770*b* and 1770*j*, Stats., are valid. They do not infringe upon any rights, privileges, or immunities granted by the federal or state constitution, do not impair the obligation of contracts, and do not contravene any provision in either of said constitutions.

14. Upon canceling, as void under sec. 1770*b*, Stats., conveyances of real property in Wisconsin to a foreign corporation which afterwards, through another person, mortgaged its interest in the premises to a bank, the consideration received by the Wisconsin owner for the property is *held*, in equity and good conscience, to belong to the bank.

ESCHWEILER, KERWIN, and VINJE, JJ., dissent in part.

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Appeal from a judgment of the circuit court for Racine county: E. B. Belden, Circuit Judge. *Modified and affirmed.*

There were originally two actions begun. The action here designated No. 1 was instituted by the *Wisconsin Trust Company* and *Frederick Robinson,* hereinafter called plaintiffs, to cancel, rescind, and set aside two separate deeds given by each to the *Realty Realization Company,* all dated and delivered February 28, 1913, pursuant to the contract between said parties, in which contract Clinton S. Woolfolk, president of the *Realty Realization Company,* joined as party of the third part, and also to cancel a deed given by said *Realty Realization Company* to the defendant *Horace E. Walter,* dated March 5, 1913, and a trust deed or mortgage given by *Horace E. Walter* to *C. B. Munday,* trustee, dated March 5, 1913, to secure *Walter's* note for $50,000. upon the security of which there was loaned by the defendant *La Salle Street Trust & Savings Bank* the sum of $40,000, and to revest the title to the premises described in all the foregoing instruments in the *Wisconsin Trust Company* and *Robinson* free of all claims of the defendants therein.

The action designated No. 2 herein was instituted December 24, 1913, by the plaintiff *Munday* as trustee and the *La Salle Street Trust & Savings Bank* to foreclose the trust deed described above as a mortgage upon the premises pledged to secure said loan of $40,000 made by said bank to said Clinton S. Woolfolk, president of the *Realty Realization Company,* evidenced by the note of *Horace E. Walter,* dated March 6, 1913, for $50,000. The premises described are a lot and five-story brick office and store building thereon located in the city of Racine, Wisconsin, and worth between $60,000 and $75,000.

The actions by stipulation were tried as one. The plaintiff *Robinson* claimed that he was induced to enter into the contract of February 28, 1913, and to execute his deed and

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to procure the execution of the deed of the *Wisconsin Trust Company* pursuant thereto by fraud; that the deed to *Walter* and the trust deed from *Walter* to *Munday* were given for the purpose of defrauding the plaintiffs and hindering and delaying them in the recovery of the premises. This claim was practically abandoned upon the trial and is expressly abandoned in the briefs of counsel filed here, and will not be considered other than as it may bear upon the question of whether or not the conveyances made by the plaintiffs to the *Realty Realization Company* are void.

Plaintiffs further claim that the deeds given by them to the *Realty Realization Company* were absolutely void, because the *Realty Realization Company*, being a corporation organized under the laws of the state of Maine, had not complied with sec. 1770*b*, Stats.; that no title passed to said *Realty Realization Company* and it could therefore convey none to *Walter;* that *Walter*, not having any title as against the plaintiffs, could not give a valid mortgage to *Munday*, and that the defendants could not acquire any rights in the property by virtue of the subsequent transactions superior to the rights of the *Wisconsin Trust Company* and *Robinson*. On behalf of *Munday*, the *Bank*, and *Niblack*, receiver, hereinafter called appellants, it was claimed that there was no fraud; that sec. 1770*b*, Stats., had no application to the transaction because it was entirely negotiated and executed at Chicago, Illinois; that appellant *Munday*, trustee, being an individual, and the *La Salle Street Trust & Savings Bank* were expressly excepted from sec. 1770*b*, Stats., with reference to the loan; that said transaction having been negotiated and consummated long after the passage of sec. 1770*j*, Stats., the original transaction, if the statute had any application to executed contracts and unilateral instruments of transfer, was voidable only on a proper case made and not absolutely void; that the subject matter being property not within the state of Illinois, the Illinois foreign corporation law had no application to the transaction be-

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tween the original parties; that the *Trust Company* and *Robinson* by the contracts and deeds in effect agreed that all persons claiming under the *Realty Realization Company,* including appellants, could not avoid the transaction and are estopped thereby from so doing; that the plaintiffs ratified and confirmed the contract of February 28, 1913, and their deeds given pursuant thereto; that *Robinson,* the owner of the entire equitable title and interest in the premises, having placed the title in the control of the *Realty Realization Company,* a dealer in real estate, with knowledge that said property would be used by the latter in its business, was and is estopped and precluded from questioning the subsequent dealings by that company with said property, to the prejudice of the rights therein acquired by appellants.

There was a trial by the court, and the court found that the *Realty Realization Company* was guilty of fraud in the procurement of the contract and conveyances to it, but did not connect the appellants therewith; that the *Bank* loaned $40,000 on the trust deed for which it issued its certificates of deposit, and that no part of the loan had been repaid; that Woolfolk discounted the certificates of deposit received by him on account of the loan on March 18, 1913, with James H. Prentiss and used part of the proceeds for the benefit of the *Realty Realization Company,* the balance being unaccounted for; that said certificates at or prior to the maturity thereof were paid by the *Bank* to the holders who discounted the same for the said Clinton S. Woolfolk; that prior to the making of said loan the *Realty Realization Company* and Woolfolk were well known to the *Bank* and *Munday* and were depositors therein; that appellants *Munday* and the *Bank* were warned and put upon inquiry, by the recitals contained in the deeds to the effect that the *Realty Realization Company* was a body corporate of the state of Maine, as to whether said company had complied with sec. 1770*b,* Stats., and that said appellants had failed to exercise ordinary care and prudence to ascertain whether

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said company had complied with the laws of Wisconsin, and that the *Wisconsin Trust Company* and *Robinson* had no knowledge that said company had failed to comply with sec. 1770*b* until on or about March 30, 1913.

As conclusions of law the court found that the contract between *Robinson* and the *Realty Realization Company* and the deeds from the *Trust Company* and *Robinson* to the *Realty Realization Company* pursuant thereto were and are wholly null and void; that the *Realty Realization Company* secured no title thereby, conveyed none to *Walter,* and that *Walter's* trust deed to *Munday* was and is a nullity; that *Munday* and the *Bank* were and are chargeable with notice and knowledge of the invalidity of the title claimed by and through the *Realty Realization Company,* and that *Robinson* and the *Trust Company* are not estopped by any act or conduct on their part from asserting their title to said premises as against any of the other parties thereto; that the receiver of said *Bank,* by virtue of said trust deed and the loan made thereon by said *Bank,* acquired no lien on the premises and no right to be subrogated to the *Realty Realization Company;* that *F. M. McKey,* trustee in bankruptcy of the *Realty Realization Company,* was entitled to the return of the consideration received from said company by *Robinson* for said conveyances; that plaintiffs were entitled to judgment for the relief prayed for in their complaint in action No. 1, and in action No. 2 to judgment dismissing on the merits appellants' complaint for foreclosure, vacating and setting aside the trust deed and removing same of record as clouds on their title, and quieting their title to the premises, and for costs. Judgment was entered accordingly. *Munday, La Salle Street Trust & Savings Bank,* and *Niblack* as receiver appeal from the entire judgment. The appellants took proper exceptions to the findings made, and made proper requests for other findings and assignments of error necessary to raise all the questions hereinafter considered. The case was thoroughly tried and ably presented

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both in this court and in the trial court. We shall not attempt a detailed statement of all the facts, as the record is a long one and it is not thought necessary in view of the disposition which we make of this case.

For the appellants there were briefs by *Thompson, Myers & Kearney* of Racine, attorneys, and *Joseph W. Moses* of Chicago and *Thomas M. Kearney* of Milwaukee, of counsel, and a supplemental brief by *Thomas M. Kearney,* of counsel; and the cause was argued orally by *Mr. Moses* and *Mr. Thomas M. Kearney.*

For the respondents *Wisconsin Trust Company* and *Frederick Robinson* there was a brief by *Simmons & Walker* of Racine, attorneys, and *William E. Black* of Milwaukee, of counsel, and oral argument by *Mr. Black* and *Mr. John B. Simmons.*

For the respondents *F. M. McKey,* trustee in bankruptcy, and the *Realty Realization Company* there was a brief by *Hand & Quinn* of Racine, and oral argument by *E. B. Hand.*

The following opinions were filed June 19, 1918:

Rosenberry, J. The deeds given by the plaintiffs to the *Realty Realization Company* were dated and delivered February 28, 1913, at which time the *Realty Realization Company* admittedly had not complied with the provisions of sec. 1770*b*, Stats. It is claimed that the failure of the *Realty Realization Company* to comply with the provisions of sec. 1770*b* does not render the deeds absolutely void, for three reasons: (1) The business was not transacted in Wisconsin; (2) the transaction was interstate in character; and (3) the statute applies only to bilateral and executory agreements and does not apply to executed contracts.

Sec. 1770*b* has been considered in a series of cases beginning with *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904, and ending with *Phœnix N. Co. v. Trostel,* 166 Wis. 215, 164 N. W. 995. No useful purpose would be served by again reviewing these cases.

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Certainly the deeds in question are within the terms of this statute, for they clearly relate to property within this state. In the consideration of this case we regard as immaterial the fact that the contract was negotiated in the state of Illinois. No matter where negotiated it was a transaction relating to property within this state, and under familiar principles its validity must be determined in accordance with the laws of this state. But it is claimed that because the business was transacted in the state of Illinois it is interstate in character because, as a part of the transaction, the Wisconsin owner of the real estate in question received fifty shares of the common stock of the Maine corporation and by the terms of the contract was to receive 700 shares of the preferred stock of the corporation; that the law of Wisconsin can have no extraterritorial effect, and therefore cannot operate upon transactions negotiated and made outside of the state of Wisconsin.

It is true that the provisions of sec. 1770*b* do not apply to such contracts as relate to interstate commerce. Interstate commerce has as a necessary element the transportation of goods between states. We see no circumstances connected with this transaction from which it may be inferred that it was interstate in character, as that term is used in the law relating to interstate commerce.

Beaser v. Barber A. P. Co. 120 Wis. 599, 98 N. W. 525, and *Laun v. Pac. Mut. L. Ins. Co.* 131 Wis. 555, 111 N. W. 660, are cited as sustaining the proposition that sec. 1770*b* applies only to bilateral contracts and does not operate upon executed contracts. A large number of cases from foreign jurisdictions are also cited to the same effect. This question, it seems to us, is clearly determined adversely to the appellants by the prior decisions of this court to which we must adhere. *Hanna v. Kelsey R. Co.* 145 Wis. 276, 129 N. W. 1080. Nearly every deed or conveyance is given pursuant to an antecedent contract, written or oral, and if the statute should be held not to apply to a deed given in performance of such antecedent contract its purpose would

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be defeated. While the statute is in many respects a harsh one, it has nevertheless been upheld repeatedly by this court and thereafter reconsidered by the legislature in some of its aspects and no change has been made to avoid or modify the interpretation placed upon it by the court.

In *Hanna v. Kelsey R. Co.* 145 Wis. 276, 129 N. W. 1080, the statute was expressly held to apply to the conveyance of land in this state to a foreign corporation, and in this case it was also expressly held that a conveyance to a foreign corporation which had not complied with sec. 1770*b* was absolutely void and not merely voidable. Upon the authority of the prior decisions of this court we must hold that the deeds given by the *Wisconsin Trust Company* and *Frederick Robinson* to the *Realty Realization Company* are absolutely and wholly void as to the *Realty Realization Company* and its grantees; that no title was conveyed thereby to the *Realty Realization Company,* and that the subsequent deeds given are without legal force or effect, unless (1) the title to premises is confirmed in appellants by sec. 1770*j,* Stats., as amended by ch. 211, Laws 1917, or (2) unless plaintiffs are estopped to claim the benefit of sec. 1770*b.* It is undisputed that on February 28, 1913, *Robinson* entered into a contract with the *Realty Realization Company,* party of the second part, and Clinton S. Woolfolk, party of the third part, by the terms of which *Robinson* agreed to procure from the *Wisconsin Trust Company* a conveyance of the premises in question to the *Realty Realization Company,* in consideration for which the *Realty Realization Company* was to pay the sum of $75,000, $5,000 in cash upon delivery of the deeds, and the balance according to the terms of six promissory notes, the payment of which was to be secured by the deposit of preferred stock of the *Realty Realization Company* as collateral security. The contract also gave to *Robinson* an option to purchase certain stock of the *Realty Realization Company* within the time and upon the terms therein specified, and included other details

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of the transaction. This contract was delivered on February 28, 1913, the deeds in question being delivered at the same time as part of the same transaction. The *Realty Realization Company* had at that time not complied with the provisions of sec. 1770*b*, but on October 5, 1915, it did comply with the terms of said section and was duly licensed and authorized to transact business and to acquire and hold property within this state. That part of sec. 1770*b* material here is as follows:

"2. No corporation, incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, shall transact business or acquire, hold, or dispose of property in this state until such corporation shall have caused to be filed in the office of the secretary of state a copy of its charter, articles of association or incorporation and all amendments thereto duly certified by the secretary of state of the state wherein the corporation was organized. . . . Nothing in this section shall be construed to prevent foreign corporations from taking or holding mortgages or trust deeds on property in this state to secure payment of money loaned or advanced. Mortgages or trust deeds heretofore taken by foreign corporations to secure the payment of money loaned or advanced are hereby declared valid." [Sub. 2, sec. 1770*b*, Stats. 1911.]

". . . Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them." [Sub. 10, sec. 1770*b*, Stats. 1911.]

It having been held in *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904, and other cases, notably *Hanna v. Kelsey R. Co.* 145 Wis. 276, 129 N. W. 1080, that contracts entered into with foreign corporations which had not

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complied with sec. 1770*b* were wholly void and not voidable, there was enacted ch. 142, Laws 1911, which took effect May 13, 1911, the material parts of which are as follows:

"Section 1. There is added to the statutes a new section to read: Section 1770*j*. 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of sec. 1770*b* of the statutes, or acts amendatory thereof and which has thereafter, and before the passage of this act, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired.

"2. Any person claiming that the legal title of any corporation or of any person claiming by, through, or under such corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of subsection 1 of this act, to comply with section 1770*b* of the statutes, or acts amendatory thereof, shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the passage and publication of this act, and in case of failure to do so his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired; provided that this act shall not affect any action now pending."

Section 1770*j* as enacted by ch. 142, Laws 1911, was amended by ch. 212, Laws 1913. We do not determine in this case what effect, if any, the enactment of ch. 212, Laws 1913, had as to title attempted to be conveyed to corporations which complied with sec. 1770*b* after the passage of ch. 142, Laws 1911, and prior to the enactment of ch. 212, Laws 1913. Manifestly ch. 212, Laws 1913, could not operate to validate the contract and deeds in question in this case, as the *Realty Realization Company* had not complied with the provisions of sec. 1770*b* prior to the passage of ch. 212. After the case had been tried and while it was still

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under advisement and undecided, secs. 1770*b* and 1770*j* were amended by the enactment of ch. 211, Laws 1917. Said sections as amended by ch. 211 are as follows, that part incorporated by the enactment of ch. 211 being italicized:

"Section 1. Subsection 2 of section 1770*b* and subsection 1 of section 1770*j* of the statutes are amended to read: (Section 1770*b*) 2. No corporation, incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, *or corporations not organized or conducted for profit,* shall transact business or acquire, hold, or dispose of property in this state until such corporation shall have caused to be filed in the office of the secretary of state a copy of its charter, articles of association or incorporation and all amendments thereto duly certified by the secretary of state of the state wherein the corporation was organized . . . and provided, further, that except as regards the advancing and loaning of money and the taking, acquiring, holding and enforcing of securities as above provided, nothing herein contained shall be construed as authorizing any foreign corporation to transact in this state the business of a bank or trust company, or otherwise to exempt any foreign corporation (other than the railroad, religious, charitable and insurance corporations *and corporations not organized or conducted for profit* above specified) from the provisions of this section or other statutes of this state. Nothing in this section contained shall affect the rights of parties in any action which may now be pending.

"(Section 1770*j*) 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of section 1770*b* of the statutes, *and which is now not required to comply with said section or* which has thereafter, and before the passage of this section, complied with said section, shall be and is hereby relieved from any disability pro-

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vided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired, and the title so acquired, or attempted to be acquired, is hereby confirmed."

The appellants claim that by the enactment of ch. 211, Laws 1917, the title of the *Realty Realization Company* and its grantees to the property in question was confirmed and validated. The plaintiffs claim that the enactment of said law did not affect the situation, for the reason that the *Realty Realization Company* is not within the terms of said chapter. Ch. 211, Laws 1917, consisted of two sections; the first incorporated the provisions of secs. 1770*b* and 1770*j* as amended and the second provided when the act should take effect.

The controversy turns upon what is meant by the language used in that part of the first section amending sec. 1770*j* as follows:

"Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of section 1770*b* of the statutes, and which is now not required to comply with said section or which has thereafter, and *before the passage of this section,* complied with said section, shall be and is hereby relieved," etc.

Do the words "before the passage of this section" refer to sec. 1 of ch. 211, Laws 1917, or do they refer to the passage of sec. 1770*j*? In other words, did the legislature intend by the enactment of ch. 211, Laws 1917, to confirm and validate all titles attempted to be acquired by foreign corporations prior to the enactment of sec. 1 of that act, or did it intend by the amendment to sec. 1770*b* and the first subsection of sec. 1770*j* to exempt "corporations not organized or conducted for profit" from the provisions of sec. 1770*b* and to confirm the titles attempted to be acquired by a corporation "which is now not required to comply with said section"?

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In determining this question we must search for the intention of the legislature, and if that be ascertained it is our duty to give it effect within established rules. In ascertaining the legislative intention there is one consideration which we think is of controlling force in this case: If the legislature had intended by the re-enactment of sub. 1 of sec. 1770*j* to confirm and validate the title theretofore attempted to be acquired by all foreign corporations which had not complied with sec. 1770*b*, it could have had no object in amending sec. 1770*j*, because the words "any corporation organized otherwise than under the laws of this state" would include "corporations not organized or conducted for profit," which were exempted from compliance with sec. 1770*b* by the enactment of ch. 211. Therefore the insertion of the words in sec. 1770*j*, "which is now not required to comply with said section," would be superfluous, because such corporations would be properly described in the first part of sub. 1 of sec. 1770*j*. As used in sec. 1770*j* we think the words "this section" in the phrase "and before the passage of this section," refer to the enactment of sec. 1770*j* and not to sec. 1 of ch. 211. *Dallmann v. Dallmann,* 159 Wis. 480, 149 N. W. 137. The re-enactment of sec. 1770*j* for the purpose of admitting a new class of corporations, to wit, that "which is now not required to comply with said section," did not and was not intended to bring within the provisions of that section all corporations which had complied with the law subsequent to the passage of ch. 142, Laws 1911, which created and enacted sec. 1770*j*. The words "before the passage of this section" are not a part of the amendment, but are a part of sec. 1770*j* as it was originally created. The repetition of language in an amending statute which provides that the original section shall be "amended to read as follows," does not repeal and re-enact the repeated language, but the repeated part remains in force as of the time of the original enactment, in the absence of a clearly expressed legislative intent to the contrary.

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The *Realty Realization Company* was admittedly not "a corporation not organized or conducted for profit," as that term is used in sec. 1770*b*, and therefore is not exempted from complying with sec. 1770*b* and is not included within the language "which is now not required to comply with said section." As stated before, we do not determine the effect of the enactment of ch. 212, Laws 1913, but in arriving at the conclusion stated above we have carefully considered the arguments based on the terms of that statute as indicating the intent and purpose of the legislature in the re-enactment from time to time of sec. 1770*j*.

Because the title attempted to be acquired by the deeds delivered February 28, 1913, was not confirmed and validated by the enactment of ch. 211, Laws 1917, we think the conclusion of the trial court that said deeds were void and conveyed no title is correct and should be affirmed.

Appellants claim that plaintiffs are estopped to claim the benefits of sec. 1770*b*. It is admitted that the *Wisconsin Trust Company* was a bare trustee; that *Robinson* had the right to direct a conveyance of the property at such time and upon such terms and conditions as he chose. The claim of estoppel is based upon the following propositions: (1) The right to annul a contract made with a foreign corporation which has not complied with sec. 1770*b* is a purely personal right as to which no question of public interest attaches; (2) the right claimed by *Robinson*, being purely personal in character, will not be enforced if such enforcement would be inequitable; (3) *Robinson* is estopped by the character, form, and conditions of the contract and deeds involved herein from having the remedy he seeks; (4) *Robinson* is estopped from avoiding the transactions in this case by reason of the fact that by the transaction he became and was a stockholder of the *Realty Realization Company;* (5) *Robinson* should be estopped because, as a stockholder of the *Realty Realization Company* with full knowledge that his grantee was about to deal with the title to the prop-

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erty conveyed, he stood by without concern and permitted the title to be pledged for the debt admittedly owing to *C. B. Munday* as trustee for the *Bank*.

It cannot fairly be said that no question of public policy is involved in the determination of this question. It is clear that sec. 1770*b* is a declaration of a public policy of this state with reference to the transaction of business within the state by a foreign corporation. If we permit the provisions of that law to be whittled away and diminished from time to time in order to give effect to private rights, the whole legislative purpose will be defeated. While it has been said in *Mortenson v. Murphy*, 153 Wis. 389, 141 N. W. 273, that the person there referred to "did not want to take advantage of a technicality which would permit him to sell the premises a second time, and he deeded to the bank, the then holder of the mortgage, for the apparent purpose of validating the attempted transfer of the property by the corporation," and in *Bennington Co. Sav. Bank v. Lowry*, 160 Wis. 659, 662, 152 N. W. 463, that "a party has no vested right in a defense based upon an informality not affecting his substantial equities," it does not follow from the language of these decisions that no matter of public interest is involved in a case such as the one before us. If we apply to situations such as the one presented here the doctrine of estoppel contended for by appellants, the whole statute would be practically avoided. We have already set out the terms of the contract pursuant to which the deeds in question were issued, and it is admitted that the contract was fully performed, and that pursuant to the terms of said contract *Robinson* directed the *Trust Company* to convey the property to the *Realty Realization Company;* that pursuant to such direction the *Trust Company* acknowledged its deed made under the authority recited; that the deed contained a special covenant of warranty as against all persons claiming under the *Trust Company;* that *Robinson* and wife made their deed confirming the title conveyed to the *Trust Com-*

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pany, in which they included a special covenant of warranty as against any person claiming through or under them, said deeds being in the usual form and the covenants running in each instance to the grantee, its successors and assigns; that as a part of the transaction *Robinson* secured the guaranty of Woolfolk to the notes given for part of the purchase price; and it is claimed that by the making and delivery of the deeds *Robinson* elected to affirm the contract and validated it within the provisions of sec. 1770*b*, and he cannot now be permitted to claim to the contrary.

As has been pointed out, practically speaking every deed is made and delivered in execution of some prior oral or written contract. Besides that, in this case it clearly appears that the making of the contract and the execution and delivery of the deeds, the payment of the money, and the execution of the notes constituted a single transaction. How can it be said that the covenants of warranty contained in the very instrument made void are or can be a ratification of the making of the deed itself?

The delivery took place on February 28, 1913; Woolfolk died suddenly on March 28, 1913, and on that day notices were served by *Robinson* asserting the invalidity of the conveyances on the ground that the *Realty Realization Company* had failed to comply with sec. 1770*b*, and on March 31st a second notice signed by *Robinson* and the *Wisconsin Trust Company* was placed of record in the office of the register of deeds of Racine county, and on March 31st an action of ejectment was brought against *Horace E. Walter*, holder of the title as it then stood of record. The plaintiffs moved with commendable promptness.

While it is true that the transaction contemplated that the property attempted to be conveyed should be reconveyed by the *Realty Realization Company*, which was a dealer in real estate, we see no significance in the fact. The purpose of every conveyance is to enable the grantee to deal with the property as his own. The purpose of the statute is mani-

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festly to compel foreign corporations to comply with its terms before transacting business within this state or attempting to hold or acquire property situated within this state. We think the contentions made here, although presented as they are with great clearness and ability, are disposed of by the prior decisions of this court. In nearly all or every imaginable case all or some of the circumstances here urged as grounds for estoppel are present. In *Hanna v. Kelsey R. Co.* 145 Wis. 276, 129 N. W. 1080, the foreign corporation was found to be a purchaser in good faith for a valuable consideration, nevertheless the conveyance was held void and the grantor not estopped. While it has been well said the law is a harsh one, may prove inequitable, and result in injustice to private parties, nevertheless it is the declared law of the state, its constitutionality has been passed upon by this court as well as by the supreme court of the United States, and we are bound to give it effect according to its terms; and we cannot say that in one case it shall have a certain effect because some private right has intervened and in another case it shall have a different effect because some other private interest is involved, but it is our duty to give it effect according to the legislative intention.

It is claimed that the enactment of ch. 142, Laws 1911, makes a change in the legislative policy of this state in view of the decision of this court in *Hanna v. Kelsey R. Co., supra.* This chapter was considered in *Lanz-Owen & Co. v. Garage E. M. Co.* 151 Wis. 555, 139 N. W. 393. We see nothing in the enactment of that chapter to indicate any intention or purpose on the part of the legislature to relieve corporations thereafter transacting business or acquiring property within this state from complying with sec. 1770*b*. Had such been the legislative purpose it could very easily have been stated. On the other hand, the legislature failed to change the terms of sec. 1770*b* as interpreted in *Hanna v. Kelsey R. Co.,* but chose to relieve those who prior thereto had inadvertently or mistakenly supposed sec. 1770*b* not

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to be applicable to their particular situation, by the enactment of ch. 142. This does not indicate a purpose to change the legislative policy of the state, but rather to adhere to it.

Holding as we do that the deeds in question were void and not voidable, we need not consider whether or not the *Bank* or *Munday* failed to exercise ordinary care with respect to the ownership of the property in question. It is manifest that the void deeds conveyed no title, the subsequent conveyances of the *Realty Realization Company* to *Walter* conveyed none, and that matter need not be further considered.

It is claimed that sec. 1770*b* and sec. 1770*j* are unconstitutional and void in that they violate the provisions of the constitution of the state of Wisconsin and the federal constitution, and that the judgment of the circuit court in failing to give force and efficacy to sec. 1770*j*, Stats., as amended by ch. 211, Laws 1917, infringed the rights, privileges, and immunities of the appellants under the applicable sections of the federal constitution, and that the judgment of the circuit court declaring said deeds void, which is here affirmed, impairs the obligation of said contract, contrary to the applicable provisions of the constitution of the state of Wisconsin and of the federal constitution; that by holding sec. 1770*b* and sec. 1770*j* of the Wisconsin Statutes, as amended, as construed by this court, valid, which holding is here affirmed, the trial court infringed the rights of the appellants under the applicable provisions of the federal and Wisconsin constitutions. We think these contentions have been disposed of in the prior decisions of this court and by the supreme court of the United States, and we shall not consider them further than to say that we have carefully examined them and are of the opinion that the decision of the trial court upholding said provisions, which is affirmed by this court, in no respect contravenes any of the provisions of the constitution of this state or of the United States. *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904;

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Diamond G. Co. v. U. S. G. Co. 187 U. S. 611, 23 Sup. Ct. 206.

In *Duluth M. Co. v. Clancy,* 139 Wis. 189, 194, 120 N. W. 854, the court said:

"There is doubtless a limit beyond which the law cannot go in holding one party to an illegal contract bound and the other free, but that limit is not reached or passed in a case where this provision can be considered an additional penalty on that party for violation of law."

It is claimed that by the use of this language this court has placed an interpretation upon the act which makes it unconstitutional, it having been held in *Lanz-Owen & Co. v. Garage E. M. Co.* 151 Wis. 555, 139 N. W. 393, that a conveyance to an unlicensed corporation was not absolutely void, but was voidable merely at the election of the other contracting party; it being claimed that the power to impose this additional penalty for the doing of the prohibited act lies with a private citizen and may be imposed or not at his whim or caprice, and that the delegation of legislative power to a private individual to impose a penalty or not at his election renders the act unconstitutional and void.

The language of these decisions, fairly construed, is not subject to this interpretation. On behalf of the corporation and its assigns the contract is by the express provisions of the section absolutely void. That the character of the contract on behalf of the offending corporation is not altered or changed by its enforcement by the other party is abundantly established by the prior decisions of this court. In *Rib Falls L. Co. v. Lesh & Mathews L. Co.* 144 Wis. 362, 129 N. W. 595, it was distinctly held that while the plaintiff had a right to enforce its contract against a foreign corporation, and even if it exercised that right, the foreign corporation could not assert its rights under the same contract by way of counterclaim, but that it might show by way of defense that it had not received the goods contracted for and for the purchase price of which it was being sued. In *Phœnix N. Co. v. Trostel,* 166 Wis. 215, 164 N. W. 995, the plaintiff had

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sold certain nursery stock to the defendant and as part of the contract had agreed to plant the trees and shrubs on the premises of the defendant, plaintiff having its nursery at Bloomington, Illinois, and the defendant living at Milwaukee, Wisconsin. There was a dispute, the plaintiff brought suit, and the only defense made was that plaintiff had not complied with sec. 1770*b*, the claim of plaintiff being that the transaction constituted interstate commerce and that it was therefore exempt from the provisions of the statute. Following *Browning v. Waycross,* 233 U. S. 16, 34 Sup. Ct. 578, this court held that the transaction did not constitute interstate commerce in view of the agreement to plant the trees and shrubs, and in response to claim of counsel that defendant should not be permitted to retain the benefits of the contract and then be relieved from the burden the court said:

"We fully concur in the view called to our attention by counsel for plaintiff that courts should not without good cause permit parties to reap the benefit of their contracts and then be relieved from their burdens. Where, however, a constitutional legislative declaration is explicit in declaring a prohibited contract void and the case is clearly within the prohibition, courts have but one course to pursue, and that is to enforce the statute."

We think this disposes of the question raised by appellants, and while, as pointed out by the late Justice TIMLIN, the language used, if considered apart from the text, may form a basis for the claim made, we think that the decisions in *Hanna v. Kelsey R. Co.* 145 Wis. 276, 129 N. W. 1080, and *Lanz-Owen & Co. v. Garage E. M. Co.* 151 Wis. 555, 139 N. W. 393, are not inconsistent with the other decisions of this court, and that it is clear that the contract does not become void or not at the election of the opposite party, but is void by the terms of the statute, and that the law has been so construed by this court from the beginning. To be sure, the opposite party may at his election enforce it, but so far

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as it is a contract in favor of or on behalf of the offending corporation it is void.

The statute has been repeatedly applied to executed contracts, as in *Hanna v. Kelsey R. Co., supra,* where the deed to the foreign corporation had been delivered and the price paid, the corporation being admittedly an innocent purchaser. The grantor had in no manner repudiated the conveyance or sought to recover the property, and the court held the deed void at the instance of a third party. And in *Indiana R. M. Co. v. Lake,* 149 Wis. 541, 136 N. W. 178, a rock crusher had been delivered to and accepted by the town officers and town orders had been issued in payment, yet the contract was declared void. Again in *Mortenson v. Murphy,* 153 Wis. 389, 141 N. W. 273, a deed to a foreign corporation was declared void although the contract was fully executed and the purchase money paid.

There remains to be considered the disposition of the $5,000 paid by the *Realty Realization Company* under the contract of February 28, 1913, to the plaintiff *Robinson.* While the *Realty Realization Company* acquired no title to the realty in question and conveyed none to *Walter* and therefore *Walter* had no title which he could mortgage to the *Bank,* we think as between the *Realty Realization Company* and the receiver of the *Bank,* under the settled maxim that equity considers that done which ought to be done, and the *Realty Realization Company* having through *Walter* in fact mortgaged its interest in the premises, if any, to *Munday* as trustee for the *Bank,* the $5,000 in equity and good conscience belongs to the *Bank* and *William C. Niblack,* its receiver, and the judgment of the circuit court is modified accordingly. *Mr. Robinson,* to whom the sum was paid, agrees to repay the amount to whomsoever the court shall find entitled thereto. A similar disposition should be made of the notes, stocks, and securities which he received from the *Realty Realization Company.*

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By the Court.—The judgment of the circuit court is modified as stated in the opinion and as so modified is affirmed. The *Wisconsin Trust Company* and *Frederick Robinson* to tax one bill of costs against the appellants.

VINJE, J., dissents in part.

ESCHWEILER, J. *(dissenting in part).* As between the grantor of the real estate, *Robinson,* who conveyed knowing that it was in effect to be used for trading purposes, and the *La Salle Street Trust & Savings Bank,* which advanced the $40,000 upon the strength of such conveyance, I think that *Robinson* should be estopped from taking advantage of the statute relied upon.

KERWIN, J. I concur in the foregoing dissenting opinion of Justice ESCHWEILER.

A motion by the appellants for a rehearing was denied, with $25 costs, on October 8, 1918, and the following opinions were filed November 6, 1918:

VINJE, J. *(dissenting).* I am unable to concur in the view that the amendment to sec. 1770*j* of the Statutes made by ch. 211, Laws 1917, did not operate to validate the deeds to the *Realty Realization Company,* which had theretofore complied with sec. 1770*b*. Briefly stated my reasons are these: The case of *Hanna v. Kelsey R. Co.* 145 Wis. 276, 129 N. W. 1080, holding that a deed to a foreign corporation that had not complied with sec. 1770*b* of our Statutes was void, was decided February 21, 1911. No doubt many titles were affected by that decision. To grant relief, ch. 142, Laws 1911, enacted sec. 1770*j*, which took effect May 13, 1911. That section provided that any corporation which had before the passage of the act complied with sec. 1770*b* was relieved from any disability in the previous acquisition of real property in this state, and that a person claiming that the title of any corporation was void because of a fail-

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ure to comply with sec. 1770*b* and the amendment of 1911 might within a year from May 13, 1911, begin an action or set up a defense to declare the title void. If such action or defense was not begun or set up before May 13, 1912, the right thereto expired. In the case of *Lanz-Owen & Co. v. Garage E. M. Co.* 151 Wis. 555, 139 N. W. 393, this court construed the act as a statute of limitations within which actions could be begun or defenses interposed to declare the title of noncomplying corporations void, and held that at the end of the year, in the absence of any action or defense, the title became absolute. Notwithstanding this decision, which was handed down January 7, 1913, the legislature that year amended sec. 1770*j* by the enactment of ch. 212, which, after the title and enacting clause, read:

"Section 1. Section 1770*j* of the statutes is amended to read: Section 1770*j*. 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title, by deed, or lease to any real property in this state, before complying with the terms of section 1770*b* of the statutes, and which has thereafter, and before the passage of this *section,* complied with said section, shall be and is hereby relieved from any disability," etc.

If, as the court construes it, the words "this section" mean sec. 1770*j* of the Statutes and not sec. 1 of the amendatory act in which they are found, then the amendment of 1913 was entirely nugatory. All titles depending upon conditions existing prior to May 13, 1911, had been fully cured by the act of 1911 as construed in the *Lanz-Owen Case.* The same nugatory result, except as to non-profit-sharing corporations, is true of the amendment of 1917, ch. 211, which is in the same form as that of 1913. It is true that the law of 1911 says "this act" and that of 1913 "this section." But the natural construction is to refer the words to the section in which they are found in the amendatory act, namely, sec. 1, and not to the original section passed years prior thereto—especially when the latter construction nullifies the whole act. That they are intended to relate to the amendatory act

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and not to sec. 1770*j* is made evident by an inspection of the original bill submitted in 1913, which had the words "this amendatory act" instead of the words "this section." The change was made in the redraft prepared by the drafting department of the legislative reference library to conform to the then and present custom of enacting general laws in terms of *sections* and not of *acts*, so that they shall fit into the statutes without further changes. The Wisconsin Legislative Directory and Manual of 1913 required all general bills amending sections of the statutes to be in this form: "Section ——. Section —— of the statutes (of 1898) is amended to read: Section ——." Rule 46, sub. 3, p. 117. It will be observed that each bill has its own section numbers, and hence when there is found in a certain section thereof the expression, "before the passage of this section," it must refer to the passage of the section of the bill in which it is found and not to the passage of the section amended. At any rate the function of the library redraft was to make changes of form, not of substance, and it is but fair to presume that such was the intention in substituting the words "this section" for the words "this amendatory act." There is nothing in the language used to indicate the contrary. To charge the legislature with intent to cure conditions existing prior to the enactment of ch. 142, Laws 1911, in its enactments of 1913 and 1917 when those conditions were fully cured by the act of 1911 itself, except as to non-profit-sharing corporations, is to charge it with performing a mere idle ceremony in 1913, and to ignore the fact that the words "before the passage of this section," in the act of 1917, mean the same as they meant in the act of 1913, and refer to the section of the bill in which they are found and not to the section of the statute amended. We all agree it was intended by the act of 1911 to permit corporations theretofore complying with sec. 1770*b* to be relieved from its penalty. Why not give its subsequent acts the same intendment and make them accomplish something? That the period of relief

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from disability was in each case extended to the time of the passage of the amendment accords with a sane legislative intent and results in effective legislation. To construe the amendments otherwise is to assume repeated legislative attempts since 1911 to accomplish that which was substantially accomplished in 1911.

KERWIN and ESCHWEILER, JJ. *(dissenting)*. Upon the motion made for a rehearing in this case we are now constrained to dissent from the construction given by the majority opinion construing the amendment of 1917. And we concur with the views on that subject of Justice VINJE in his dissenting opinion.

The following opinion was filed November 16, 1918:

ROSENBERRY, J. We have considered the matters urged upon our attention in the briefs of counsel for appellants in support of the motion for rehearing. While some verbal inaccuracies are disclosed by the hypercritical analysis to which the opinion has been subjected, still, when the opinion is read in connection with the facts and circumstances of the case, these largely if not entirely disappear. It was not supposed by the court that the question involved was whether the legislature intended by the enactment of ch. 211, Laws 1917, to confirm and validate the titles theretofore attempted to be acquired by all foreign corporations which had not complied with sec. 1770*b*, Stats. It is perfectly clear that the enactments in question have no application to the acts of those foreign corporations which do not comply or have been excused from complying with sec. 1770*b*, and that fact is assumed without repetition throughout the opinion.

In the opinion it is said: "If the legislature had intended by the re-enactment of sub. 1 of sec. 1770*j* to confirm and validate the title theretofore attempted to be acquired by all foreign corporations which had not complied with sec. 1770*b*," etc. In the interest of clearness of expression there

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should be inserted after the words "sec. 1770*b*" the words "at the time of attempting to acquire such title, and which had thereafter complied with sec. 1770*b*."

It is not accurate to say that a foreign corporation which has been excused from complying with sec. 1770*b* has in effect complied therewith, as is argued in the opinion. But, nevertheless, after re-examination, we are clearly of the opinion that the legislature did not, by the re-enactment in ch. 211, Laws 1917, of secs. 1770*b* and 1770*j*, intend to do anything except to exempt corporations not organized or conducted for profit from the provisions of sec. 1770*b* and to confirm the title attempted to be acquired by such corporations prior to the enactment of said chapter.

By the Court.—Motion for rehearing denied.

MILEY, imp., Appellant, vs. HEANEY and others, Respondents.

MILEY and others, Respondents, vs. HEANEY and another, imp., Appellants.

May 1—November 6, 1918.

Corporations: Sale of stock: Real purchaser: False representations: Misunderstanding as to price: Written contract: Varying by parol evidence: Validity of contract: Meeting of minds: Assumption by buyer of debt of seller: Incomplete novation agreement: Stock in pledge: Rescission of contract: Action in equity: Right to jury trial: Unlawful diversion of corporate assets: Power of officers and of interested directors: Knowledge and assent of stockholders: Custom: Constructive notice of facts shown by books of corporation: Liability to restore diverted assets: Subrogation: Bills and notes: Corporation as accommodation maker: Right to recover payments made: Bankruptcy: Rights of trustee.

1. In an action upon promissory notes given in payment for certain shares of corporate stock and to foreclose a lien created as collateral security, findings by the trial court that the maker of the notes was the real purchaser of the stock and signed the notes as principal and not merely as surety for

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her husband, and that the purchase was not induced by any fraudulent representations made by or on behalf of the seller, are *held* to be sustained by the evidence.

2. A false representation made by the seller of property to the buyer that another prospective buyer had inquired as to the amount for which the property could be bought, if not accompanied by any representation as to what such other person would pay or any misrepresentation as to the value of the property or any other material fact, did not constitute actionable fraud.

3. As a result of negotiations between the seller of corporate stock and the husband of the buyer, who had, however, no authority to act for her, the seller supposed that in addition to giving notes for $110,000 the buyer was to assume and pay a debt of about $15,000 owing by him to the corporation. The buyer supposed that the notes for $110,000 were to be in full payment. She executed said notes and, to secure them, an assignment of her interest in her father's estate, in which was a recital that the notes had been given in payment for the stock; and thereupon the seller executed to her an assignment of the stock. A note to the corporation for the amount of the seller's debt above mentioned, and a novation agreement as to said debt, reciting the execution of such a note, were drawn but were never presented to or signed by the buyer and she had no knowledge thereof. *Held,* that the instruments which were executed, taken together, constituted a complete written contract, the terms of which cannot be varied by parol evidence. It was incumbent upon the seller, under the circumstances, to see that the whole agreement was embodied in the written contract, and he cannot now claim that this was not done; nor can the buyer now avoid liability on such written contract according to its terms, on the ground that there was no meeting of the minds as to the price to be paid for the stock and hence no contract between the parties.

4. The assignment of corporate stock to a buyer thereof stated that the shares "have been and now are, with the consent of said [buyer], in escrow or pledge" to a certain bank as security for a certain debt of the corporation to the bank. The stock remained so pledged for a time, but was eventually delivered to the buyer. *Held,* that if the buyer ever had a right to rescind the contract because of failure to deliver the stock such right could not be exercised after the stock was in fact delivered and accepted.

5. All issues arising in an equitable action, and especially questions which directly involve the right to equitable relief, are triable by the court, and neither party has a right to have such issues tried by a jury.

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6. The buyer of the corporate stock, as above stated, not having agreed to assume or pay the seller's debt to the corporation, could not be held liable therefor by the corporation or its trustee in bankruptcy; nor was the seller's liability therefor discharged by the incomplete novation agreement, although that had been approved by the directors of the corporation.
7. The buyer of a majority of the stock of a corporation conducting a department store constituted her husband her agent in the management of the business, and thereafter, pursuant to an agreement between her, her husband as such manager, and the seller of the stock, the corporation from time to time delivered moneys and merchandise from the store to said seller, charging the same to said buyer as advances upon her share of the anticipated net earnings of the business, and the amounts thereof were credited by said seller upon the buyer's notes given to him in payment for his stock. *Held,* that this transaction was not a usual one in the ordinary course of business in which a managing officer could bind the corporation; and that where, as in this case, a majority of the board of directors were interested in such agreement adversely to the interests of the corporation, such board could not bind the corporation thereby unless all of the stockholders should with full knowledge assent thereto.
8. The advances so made being wholly out of proportion to anything said buyer was entitled to receive in the way of dividends, and the arrangement being in effect an attempt to finance her purchase of the stock by loans out of the assets of the corporation, the stockholders cannot be charged with acquiescence therein unless direct knowledge thereof on their part is shown. The fact that previously, for a number of years during which the corporation had been making large earnings but declaring no dividends, it had been the custom to allow stockholders to obtain advances as needed or asked for, such advances being charged on their open account and treated as in lieu of dividends, cannot be construed as an acquiescence in the loans here in question, especially as they were made at a time when the corporation was earning little if any money.
9. Stockholders are not charged with knowledge of the contents of or entries in the ordinary financial books of account of a corporation.
10. The assets of the corporation used in making advances, as above stated, to the seller of the stock or for his benefit and applied in discharge of the buyer's indebtedness to him on her notes, having been unlawfully diverted, both the buyer and the seller of the stock are liable for their restoration to the

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corporation or to its trustee in bankruptcy; but the seller, having applied the amount thereof on the buyer's indebtedness to him, should, if he pays that amount to said trustee in bankruptcy, be subrogated to such trustee's rights against the buyer.

11. A finding by the trial court that a note to a bank, executed by a corporation and indorsed by one M., who was its president and principal stockholder, the proceeds of which note were credited by the bank to the corporation and for the amount of which the corporation then gave its check to M., was in fact given by the corporation for the accommodation of M. and that he did not thereby become the debtor of the corporation, but that the corporation merely became his surety to the bank, is *held* to be sustained by the evidence.

12. The corporation, accommodation maker of said note, having thereafter paid to the bank certain sums of interest on the note for the benefit of M., and after bankruptcy of the corporation certain dividends from its assets having been paid to the bank upon the note, the trustee in bankruptcy was entitled to recover from M. the amounts so paid, with interest, but was not entitled to recover from him the whole amount of the note.

13. The right which a corporation has to recover its assets which have been unlawfully diverted passes to its trustee in bankruptcy and he may maintain an action for such recovery when necessary to liquidate the claims of creditors of the corporation.

APPEALS from a judgment of the circuit court for Milwaukee county: A. H. REID, Judge. *Modified and affirmed.*

On the 4th day of January, 1913, *J. P. Miley* owned 600 shares, E. A. Heaney 300 shares, and G. M. Barrett 100 shares of the capital stock of the G. M. Barrett Company, which company was the proprietor of a department store in the city of Milwaukee. This constituted all of the outstanding capital stock of said company, except 100 shares of preferred stock of the par value of $50 per share owned by the Germania Publishing Company.

For many years *Miley* and Heaney had been the principal managing officers of the business of the corporation, *Miley* holding the office of president and treasurer and Heaney that of vice-president and secretary. *Helen Heaney* is the

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wife of E. A. Heaney, also daughter and heir-at-law of Philipp Jung, then deceased.

On or about the 4th day of January, 1913, *Miley* sold and assigned his 600 shares of stock in said Barrett Company to *Helen Heaney*. In payment thereof *Helen Heaney* executed to *Miley* fifteen promissory notes, aggregating $110,000, indorsed by her husband, E. A. Heaney, and, as collateral security therefor, executed to *Miley* an assignment of all her right, title, and interest in and to her share of the estate of Philipp Jung, her father, then deceased. Thereafter *Miley* assigned to the *Kneeland-West Lumber Company* one of said notes for $8,936.70 and to the *Germania National Bank* four of said notes, aggregating $27,612.72.

This action was brought by *Miley*, the *Kneeland-West Lumber Company*, and the *Germania National Bank* to recover certain amounts then due on said notes, to have the amounts to become due thereon adjudicated, and for a foreclosure of the lien created on *Helen Heaney's* share of Philipp Jung's estate by virtue of the assignment executed by her to *J. P. Miley* to secure the payment of said notes.

On the 16th day of March, 1915, the Barrett Company was adjudicated bankrupt, and the *First Trust Company* of Milwaukee, Wisconsin, was appointed trustee in bankruptcy for the said Barrett Company. On the 28th day of August, 1915, the *First Trust Company*, as such trustee in bankruptcy of the said Barrett Company, was made a party defendant to the action. It filed its answer to the complaint of the plaintiffs and a cross-complaint against *Helen Heaney* and *John P. Miley*, which cross-complaint was considered by this court upon demurrer in 163 Wis. 134, 157 N. W. 515. The nature of the cross-complaint, so far as material here, will sufficiently appear from the opinion.

The following is a brief presentation of some of the outstanding facts: The G. M. Barrett Company was incorporated in September, 1899, and from that time until its

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bankruptcy March 16, 1915, conducted a department store in the city of Milwaukee. At the time of its incorporation its capital stock consisted of 1,000 shares of common stock of $100 each, $60,000 of which was owned by G. M. Barrett and $40,000 by *John P. Miley*. Some time prior to February 17, 1903, *Miley* purchased from Barrett 500 additional shares, making him the holder of 900 shares of the par value of $90,000, and leaving Barrett the holder of 100 shares. Some time between February 17, 1903, and January 16, 1904, *Miley* interested the defendant E. A. Heaney, then a man of about twenty-nine years of age, in the business, and agreed to transfer to him 100 shares of stock then outstanding in his name. Heaney paid $1,000 in cash, and it was understood that the balance was to be paid out of the earnings of the stock. On the 14th day of February, 1903, *Miley* also transferred to Henry J. Killilea 200 shares of his 900 shares of stock, on credit, with the understanding that the earnings thereon from time to time would be applied on payment of Killilea's indebtedness to *Miley* therefor. From that time until the 9th day of August, 1911, at which time Killilea sold his stock to the defendant E. A. Heaney, the stockholders of said company consisted of said Barrett, owner of 100 shares; *Miley*, owner of 600 shares; Killilea, owner of 200 shares; and Heaney, owner of 100 shares. As stated, Killilea was eliminated as a stockholder on the 9th day of August, 1911, when Heaney purchased his 200 shares. From February 17, 1903, to January 18, 1908, the board of directors consisted of Barrett, *Miley*, and Killilea; from January 18, 1908, to January 20, 1912, of *Miley*, Killilea, and Heaney; and from January 20, 1912, to 1913, of Barrett, *Miley*, and Heaney. *Miley* was president and treasurer and Heaney vice-president and secretary of the company from January 16, 1904, to 1913.

On February 1, 1905, *Miley* borrowed from the *Germania National Bank* on his demand note the sum of $30,000, and on a note executed by the G. M. Barrett Company to him

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(of which more will be said hereafter) the sum of $10,000. He pledged to the bank at that time the 900 shares of stock which had been issued in his name, 200 of which he had agreed to transfer to Killilea and 100 of which he had agreed to transfer to Heaney. All of this stock remained pledged to the *Germania National Bank* until the time of the sale by *Miley* of his stock to *Mrs. Heaney*. It also remained in pledge with said bank for some time after such sale, which circumstance will receive specific attention later. As further security for the $30,000 loan there was executed to the bank by *Miley*, Killilea, John H. Kopmeier, and Clem F. Romadka an instrument dated February 1, 1905, which was declared on its face to be a continuing guaranty of said $30,000 loan.

During this time the corporate business was handled pretty much as a partnership affair. *Miley*, Heaney, and Killilea purchased merchandise from time to time on credit and drew money from time to time on open accounts. All of these items were charged against them. No dividends were actually declared, but they were treated as entitled to sixty, ten, and twenty per cent., respectively, of the earnings as the same were computed at the end of each year. On January 10, 1910, the books of the company showed a surplus sufficient, if correct, to warrant a dividend of 100 per cent. A dividend of that amount was declared and credited to the stockholders of the company in proportion to the amount of the stock held by them to absorb such surplus. The business of the company was conducted at a store on West Water street up to 1909, at which time it was moved to a new location on Grand avenue. Until its removal the business was very prosperous, and enabled Killilea and Heaney to pay for their stock for the most part out of the earnings of the company. After its removal its net earnings greatly depreciated, if indeed they did not entirely disappear.

In July, 1911, Philipp Jung died, leaving an estate which inventoried at more than $700,000. By the terms of his

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will he left the bulk of his estate to his wife and three children, of whom the defendant *Helen Heaney*, wife of E. A. Heaney, was one; providing, however, that the estate should be administered for a term of years by trustees designated in the will. It will thus be seen that, upon the death of Philipp Jung, Heaney's wife gained a certain affluence. This enabled Heaney, in August, 1911, to raise sufficient money to purchase Killilea's stock upon a note signed by *Mrs. Heaney*.

There is evidence tending to show that ever since 1909, when the store was moved to Grand avenue, *Miley* had desired to sell his interest in the corporation, and from time to time a sale of his stock by *Miley* to Heaney had been suggested but not seriously considered, for the reason that Heaney had no way of paying for the same. This desire on the part of *Miley* to dispose of his interest in the company was emphasized to Heaney in December, 1912. It appears that some time during the month of December, 1912, a perfect stranger dropped into the real-estate office of J. W. Disch of Milwaukee, and stated that he had heard that the Barrett store was for sale. Disch, testifying, thought he asked if Disch could get a price on the property and certain other information that he asked for. Disch thought he could. The man asked for an inventory and statement of assets and liabilities and the terms as to how much had to be cash, etc. This man told Disch that if the store could be bought for $100,000 he would pay Disch $10,000 commission. If it could not all be bought he wanted Disch to find out what a controlling interest could be bought for. He told Disch his name and where he was from, but Disch could not recall this at the time of trial. He gave no references as to his financial ability and Disch made no inquiry. The man said he was going to Chicago and would be back to see him later. He never came back and Disch never heard from him again. Disch went to one J. C. Sundin, another real-estate broker in Milwaukee, told him the circumstance,

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asked him to find out if the Barrett Company business was for sale, the price, terms, etc., and offered to divide the commission with him if a sale were consummated. Nothing was said by Disch to Sundin concerning the identity of this prospective purchaser or his financial responsibility. Sundin was acquainted with *Miley*. After the interview with Disch he wrote *Miley* a letter asking if the business or a controlling interest was for sale, the price, terms, etc., and suggesting that he had a prospective purchaser for the same. *Miley* showed the letter to Heaney. *Miley* made no reply to the letter. Sundin either wrote again or called *Miley* on the telephone asking for a reply to his inquiry. *Miley* told Heaney that Sundin was pressing for an answer. Heaney urged him not to sell. *Miley* insisted that he had wanted to get out of the business for some time on account of his health and thought he ought not to miss the opportunity. He had the bookkeeper make out a statement showing the value of his interest in the business. This statement showed *Miley's* interest to be worth around $108,000. *Miley* gave Heaney a copy of this statement. He told Heaney that he would sell to Sundin's prospective purchaser for that amount, but he would rather sell to him.

About this time Killilea met Heaney and told him that he understood *Miley* was going to sell. He reminded Heaney what position he would be in if an outsider acquired a controlling interest in the company. He reassured Heaney that *Miley* was going to sell. He suggested to Heaney that he ought to buy *Miley's* stock and offered to and did see the Jung family to induce them to indorse Heaney's notes for the amount of *Miley's* stock. Heaney was much wrought up. He feared that a controlling interest by strangers would deprive him of his position and otherwise militate against his interests. The matter of indorsing Heaney's notes was taken up with the Jung family, first by Killilea and then by Heaney. The Jung family refused to become surety on his notes. It was then suggested that *Mrs. Heaney* could se-

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cure the notes by giving an assignment of her interest in the Jung estate. A sale was finally arranged. *Mrs. Heaney* executed her notes for $110,000 and an assignment of her share in the Jung estate as collateral security, and *Miley* executed a transfer and assignment of his stock, 600 shares, to *Helen Heaney*. These papers bear date January 4, 1913, although it seems certain that they, or some of them, were executed January 9, 1913. During the time of the preliminary negotiations *Mrs. Heaney* was sick in a hospital, where she had given birth to a child. She and *Miley* had no personal negotiations. They were conducted by Heaney and *Miley*. At the time the papers were signed *Mrs. Heaney* had been brought home, but she was still confined to her bed. After the sale and transfer *Miley*, to outward appearances, maintained his usual relations with the company, continued his presence in the store, and pretended to act as its president and treasurer until some time in March at least.

During the preliminary negotiations it had been figured by *Miley* and Heaney that the notes could be met and the stock paid for out of the earnings of the corporation plus her income from the Jung estate. *Miley* continued to secure merchandise and cash from the store as usual, which were, in the first instance, charged to him on the books of the corporation. Upon his protest, however, that such advances should be charged to *Mrs. Heaney* instead of to him, because such advances were to be treated as a credit upon *Mrs. Heaney's* indebtedness, resolutions by the board of directors were adopted from time to time transferring the account from him to *Mrs. Heaney;* in other words, charging the account, appearing against him on the books of the company, to *Mrs. Heaney* and in terms releasing him therefrom.

The action was tried by the court and judgment was rendered in favor of *Miley* and against *Helen Heaney* for the sum of $25,100.72 then due on said notes, and adjudging that there was to become due to the plaintiff *Miley* on said notes the sum of $50,071.90; that there was due to the

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plaintiff *Germania National Bank* on said notes from the said *Helen Heaney* the sum of $13,657.66 and that there was to become due the sum of $15,934.72; that there was due the plaintiff *Kneeland-West Lumber Company* $1,101.90 and to become due $8,936.70; that the *First Trust Company* recover from *John P. Miley* the sum of $25,840.61 and from *Helen Heaney* the sum of $24,149.21. The judgment further decrees a foreclosure of the lien created by the assignment aforementioned, unless *Helen Heaney* shall pay the amount of said judgment rendered against her into court by a day fixed therein. From the judgment so entered *Helen Heaney, First Trust Company,* and *John P. Miley* appealed.

Fifteen briefs in all were filed on the various appeals by the following attorneys, all of Milwaukee: by *Miller, Mack & Fairchild* for *Helen Heaney;* by *Frank M. Hoyt* and *Thomas M. Kearney* for *John P. Miley* and *Kneeland-West Lumber Company;* by *Austin, Fehr & Gehrz* for *Germania National Bank* and *F. M. Wilmanns;* and by *Bottum, Bottum, Hudnall & Lecher* for *First Trust Company,* as trustee in bankruptcy. The cause was argued orally by *J. G. Hardgrove* and *Geo. P. Miller;* by *Frank M. Hoyt* and *Thomas M. Kearney;* by *Gustave G. Gehrz;* and by *Louis A. Lecher.*

The following opinion was filed July 8, 1918:

OWEN, J. *Helen Heaney's* principal defenses to plaintiffs' complaint were (a) that she was not the purchaser of the stock but merely surety for her husband, who was the real purchaser; (b) that she was induced to enter into the contract by reason of false representations made by *Miley* with reference to the value of the property; (c) that she and her husband were induced to enter into the contract of purchase by reason of representations that a stranger stood ready and willing to buy the stock, that such representations were false, and that they would not have entered into the contract except for such fraud and deceit so practiced; and (d) that there was not a meeting of the minds upon the

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amount that was to be paid for the stock, for which reason no contract was engendered and she is not liable on her notes and the assignment of her interest in the Jung estate as collateral security.

The first three grounds of defense above enumerated are questions of fact pure and simple. As was said in *Eberhardt v. Randall,* 166 Wis. 480, 166 N. W. 6:

"We do not approach the determination of the question submitted here as triers of fact in the sense that that term is ordinarily understood. Before we can disturb the finding of the trial court we must be satisfied from a consideration of all the evidence that it appears that the trial court found against the great weight or clear preponderance of the evidence. A fair presentation of the question presented by this record would require a restatement of the entire evidence. This, as has often been said, we will not make."

The lower court found that *Helen Heaney* purchased the stock as principal and not as surety. It also found that no fraudulent representations were made by *Miley* to *Helen Heaney* concerning the value of the stock which constituted an inducement on her part to enter into the contract of purchase. With these findings of fact we are entirely satisfied. Indeed, it is doubtful if contrary findings could command the approval of this court upon those questions. While there is evidence tending to cast doubt upon the question of whether the stock was worth $110,000 at the time the contract of sale was entered into, there is no evidence whatever that *Helen Heaney* relied upon any representation made in that behalf by *Miley.* A statement taken from the books of the company by the bookkeeper in its employ showed *Miley's* interest to be worth something over $108,000. This statement was shown to E. A. Heaney. He was director, vice-president, and secretary of the company and, the evidence shows, was as fully conversant with the condition of its affairs as was *Miley.* It is absurd to say that *Miley* could misrepresent either the condition of the company or the value of its stock to Heaney. But however that may be,

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there is no evidence that *Mrs. Heaney* relied upon anything that *Miley* said or did with reference to the value of the stock. It is true that this statement was shown to her at the time she signed the notes. She, however, did nothing more than to look at the footings, which showed *Miley's* interest to be worth something in excess of $108,000. She asked her husband if he thought it was worth that, and he replied that he did. If she relied on anything it was on the statement of her husband. She knew that he was fully conversant with the condition of the company and, very naturally, relied upon his judgment with reference to value. We can see nothing upon which a finding that the value of the property was fraudulently misrepresented to *Mrs. Heaney* could be based.

Upon the question as to whether she signed as principal or surety, the facts, to our minds, are equally conclusive. In the first place, the notes and the assignment given by her as collateral security therefor purported on their face to be her individual contracts. The assignment of the stock executed by *Miley* transferred the stock to her. These circumstances have more than a passing significance. It is true, of course, that parol evidence is admissible to show that her contract is one of surety rather than of principal. But there is nothing to support this claim except the testimony of Mr. and *Mrs. Heaney,* which is contradicted by every circumstance in the case. After the transaction was consummated she was treated as a stockholder by the company. She was elected a director and vice-president and voted a salary of $1,200 a year. While she testified that she attended no directors' meetings (and such seems to be the fact) and said she knew nothing of her election as director and vice-president, it seems extremely unlikely that all this could have occurred without her knowledge. A number of renewal notes were executed by her as the principal notes became due. When the company became hard pressed financially, in an effort to compromise with creditors *Mrs.*

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Heaney signed another note to the defendant *Wilmanns* for $10,000 and executed to him a second assignment of her interest in the Jung estate as security therefor; and, finally, *Helen Heaney* testified upon her examination under sec. 4096 of the Statutes: "He [E. A. Heaney] did not tell me I was going security. I cannot say that. He said, 'You sign your name. You are not going to lose anything.' The idea that I now have of going security has come to me since that time. I think it came to me at the time of the bankruptcy."

Bearing in mind the rule that persons are chargeable with notice of the contents of writings signed by them, and considering all the circumstances of this case, we feel that the finding of the court to the effect that *Mrs. Heaney* was principal rather than surety upon these notes is fully justified, and we do not see how we can be expected to say, upon this record, that the finding of the trial court to this effect is against the clear preponderance of the evidence. We have not attempted and will not enter into a discussion of all the evidence bearing upon this question. We have said this much merely for the purpose of indicating the more persuasive facts and circumstances tending to support the findings of the court.

Upon the question of the decoy purchaser the trial court said:

"*Miley* did not personally or through any agent misrepresent to either E. A. Heaney or *Helen Heaney* any fact respecting negotiations for sale of his interest in G. M. Barrett Company to a prospective purchaser represented by Sundin. While the evidence presents grounds for strong suspicion that the man who appeared at Disch's office was not a *bona fide* prospective purchaser, careful study of the evidence fails to present to my mind any sufficient support to sustain a finding that the man who appeared at Disch's office did not have in fact some purpose to negotiate in good faith, or that *Miley* either personally or through any agent procured the man to appear at Disch's office and simulate negotiations. Such a finding could be made only on clear and satis-

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factory evidence, and the inferences to be drawn from the evidence which are consistent with innocence of *Miley* seem quite as strong and reasonable as the contrary inferences, or more so."

This issue was introduced by reason of an amendment permitted to *Helen Heaney's* answer upon the trial of the case, pursuant to notice of motion to amend theretofore given, to the effect that *Miley,* with two others, entered into a conspiracy to create in the mind of E. A. Heaney the belief that *Miley* had a prospective purchaser for his interest in the company, and that unless Heaney should either buy *Miley's* interest or cause the same to be bought by someone friendly to him the controlling interest in the company would fall into strange and unfriendly hands, thereby not only depriving Heaney of the position he then occupied with the company but jeopardizing his financial investment therein. When we consider all the facts and circumstances surrounding this transaction we cannot say that our minds are entirely freed from the suspicion that *Miley* might have had something to do in procuring the visit of this stranger to Disch's office as a start for simulated and pretended negotiations calculated to have a disturbing effect upon Heaney. However, there is not a syllable of testimony to connect *Miley* in any way with the inquiring stranger. A finding holding *Miley* responsible for the stranger's visit would have little more than suspicion to support it. It is apparent that the able and experienced judge who tried this case pondered this feature well and weighed and balanced the evidence with great care. In order to justify a finding against *Miley* upon this issue, his connection with the stranger would have to appear by clear and satisfactory proof. Bearing this in mind, and bearing in mind the further fact that this court will not disturb a finding of the lower court unless it appears to be against the clear preponderance of the evidence, we are persuaded that this finding cannot be disturbed.

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We have dealt with this question upon the assumption that if the facts were as claimed by *Helen Heaney* they would constitute a defense. The question of whether such circumstances constitute actionable fraud or deceit was not raised or discussed. It is a general rule that, for misrepresentations to constitute actionable fraud, they must have been of a material fact. We know of no authority sustaining the proposition that the mere representation on the part of a seller that another stands ready and willing to purchase the property offered for sale constitutes actionable fraud or deceit. However, where a decoy purchaser is made use of to corroborate or impress upon the prospective buyer a misrepresentation concerning the value of the property sold, or some other material fact, as was the case in *Hull v. Doheny*, 161 Wis. 27, 152 N. W. 417, actionable fraud may result, not because of the representation that another stands ready and willing to buy, but because of the material misrepresentation thus corroborated. In this case the decoy purchaser was not used to impress Heaney with an inflated value of the property or any other material fact. The obvious effect of the introduction of this presumed purchaser was to disturb Heaney with the thought of what might happen to him if a controlling interest in the company should fall into unfriendly hands. It is manifest that every person holding a minority interest in a corporation such as this is continuously confronted by a similar hazard. The record here shows quite conclusively that *Miley* was anxious to sell and that he was likely to sell whenever the opportunity should be presented. This was a hazard, therefore, which continuously faced Heaney. Its impending was simply impressed upon him by the incident. There was no representation that the alleged prospective purchaser would pay $110,000 or any other amount. If there was any false representation at all, it consisted only in the fact that someone had made inquiry as to the amount that the business or a controlling interest therein could be bought for. To hold

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such a representation to be actionable fraud would place a severe limitation upon "dealers' talk" and reduce many contracts to mere scraps of paper.

Helen Heaney further contends that there was no meeting of the minds upon the question of the price to be paid for the stock; that consequently there was no contract between the parties; that she is not liable upon any contract, and, if liable at all, only for the reasonable value of the stock. This contention is based upon the following circumstances: At the time of the purchase and sale of the stock, to wit, on or about January 4, 1913, *Miley* was indebted to the G. M. Barrett Company on an open book account for an amount approximating $15,000. He contends that it was understood that *Helen Heaney* was to assume and pay this indebtedness to the G. M. Barrett Company in addition to the $110,000 evidenced by her promissory notes. Her contention is that she did not agree to pay *Miley's* indebtedness to the G. M. Barrett Company, and that the $110,000 evidenced by her promissory notes was to be in full payment, and not in part payment, of the stock. As to this the trial court found as follows:

"*Helen Heaney* never assumed or agreed to pay *Miley's* debt to the G. M. Barrett Company on book account which was outstanding on January 4, 1913. The negotiations for sale of the *Miley* stock were begun between *Miley* and E. A. Heaney. *Helen Heaney* at first had no part in it and had not given Mr. Heaney any general authority to act for her, and had not given *Miley* reason to believe that she had conferred authority. Most of the terms of the bargain were agreed upon before *Mrs. Heaney* was consulted, E. A. assuming to act for his wife and in anticipation that she would assent. *Miley* had no personal negotiations with *Helen Heaney*. *Miley* had no knowledge of what terms *Helen Heaney* had agreed to accept except as the same were embodied in instruments signed by her, and except as E. A. Heaney orally reported. The papers executed by her contain no reference to the book account of *Miley* due to the company. And there is no evidence that *Helen Heaney* was informed, before the execution of the papers by her, that

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the bargain included any agreement to assume that debt. It appears that she was not so informed. *Helen Heaney* had not at that time either constituted her husband, E. A. Heaney, her general agent with full authority to bind her to any terms of the bargain upon which he should decide, nor had she given *Miley* reasonable ground to believe that she had so constituted her husband her agent. The novation agreement 'Exhibit O' and the blank note drawn in connection therewith was never submitted to *Helen Heaney* and she never became bound by the attempted novation. The notes and assignment signed by *Helen Heaney* contain on their face no intimation that there was any further consideration for the stock than the $110,000 of secured notes. It seems unnecessary to determine whether 'Exhibit O' and the blank note, 'Exhibit L,' were prepared at the same time when the other papers dated January 4th were prepared, since the evidence fails to show that *Mrs. Heaney* ever orally agreed to pay *Miley's* book account or assented to the proposed novation."

As found by the trial court, preliminary negotiations leading up to the consummation of the sale were conducted by *Miley* and Heaney, and it appears pretty clearly that the agreement between *Miley* and Heaney was that *Helen Heaney* was to assume the book account which the Barrett Company held against *Miley*. This was explained to the attorney who drew the papers in the case, and he advised that the transfer of this indebtedness could be brought about by having *Helen Heaney* execute her note for the amount of such indebtedness to the Barrett Company, after which the directors should adopt a resolution accepting said note in full discharge of *Miley's* indebtedness and releasing him therefrom. It appears that a note for the amount of such indebtedness running to the Barrett Company, to be signed by *Helen Heaney,* was drawn by him, but the same was never presented to nor signed by *Helen Heaney*. The following agreement was also prepared:

"This agreement, made and entered into this 4th day of January, 1913, by and between G. M. Barrett Company, a corporation duly organized under and existing by virtue of

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the laws of the state of Wisconsin, first party, and *John P. Miley* of Milwaukee, Wisconsin, second party, witnesseth:

"Whereas, said second party is owing said first party certain moneys charged against the account of said second party on the books of said first party, arising out of certain advances made to said second party by said first party of moneys, goods, wares, and merchandise.

"Whereas, *Helen Heaney,* of the city of Milwaukee, Wisconsin, has this day executed her certain promissory note for the sum of $15,127.85 to said first party in payment of said debt of said second party to said first party, as aforesaid:

"Now, therefore, in consideration of the sum of one dollar to it in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the receipt of said promissory note of said *Helen Heaney* as aforesaid, which is hereby accepted as payment of said indebtedness of said second party to said first party, said first party does hereby remise, release, quitclaim, and discharge said second party of and from any and all claims arising out of any such advances made by said first party to said second party of moneys, goods, wares, and merchandise.

"In witness whereof said first party has caused these presents to be signed by its president and countersigned by its secretary, and its corporate seal to be hereunto affixed, this 4th day of January, 1913." [Signatures.]

This agreement was approved at a meeting of the officers and directors of the company held on the 9th day of January, 1913. It will be observed, however, that *Helen Heaney* never signed this agreement, and the testimony is conclusive that she never knew anything about it. It will be observed, further, that the agreement recites that she "has this day executed her certain promissory note for the sum of $15,127.85 to said first party in payment of said debt of said second party to said first party, as aforesaid." This, admittedly, she had not done. It therefore appears that *Miley* expected he was selling for approximately $125,000, while *Helen Heaney* assumed that she was purchasing for $110,000. In this sense there was not a meeting of the minds as to the terms of the contract. As we view it, how-

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ever, it does not follow that a contract was not engendered. Whatever the preliminary negotiations between the parties were, the agreement between them was subsequently reduced to writing, and we must look to the consummated written instruments to ascertain what the contract was.

In the first place, *Helen Heaney* executed to *Miley* her fifteen promissory notes aggregating $110,000, and to secure the payment of said notes she executed an assignment of her interest in the estate of Philipp Jung, deceased, and, in passing, we may note that such assignment contained this recital: "Whereas, said first party has this day sold, assigned, transferred, and conveyed unto said second party 600 shares of the capital stock of G. M. Barrett Company, a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, of the par value of $100 per share, and said second party *in payment therefor* has this day duly made, executed, and delivered to said first party her fifteen certain promissory notes in writing for the aggregate sum of $110,000," which recital would seem to indicate that $110,000 constituted the entire purchase price of the stock. Then *Miley* executed to *Helen Heaney* an assignment of his 600 shares of stock in words and figures as follows, to wit:

"Indenture made this 4th day of January, 1913, between *John P. Miley* of Milwaukee, Wisconsin, party of the first part, and *Helen Heaney* of Milwaukee, Wisconsin, party of the second part, witnesseth:

"That said party of the first part, in consideration of the sum of one dollar and other valuable consideration in hand paid, the receipt whereof is hereby acknowledged, by these presents does sell, assign, transfer, and set over unto the party of the second part, her executors, administrators, and assigns, with full power to transfer the same on the books of the corporation, all his right, title, and interest in and to 600 shares of the capital stock of the G. M. Barrett Company, a corporation organized under and existing by virtue of the laws of the state of Wisconsin, with its principal place of business at Milwaukee, Wisconsin. And said party

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of the first part further covenants and agrees with said party of the second part, her executors, administrators, and assigns, that at the request of her or them he and his executors, administrators, and assigns shall and will, at all times hereafter, execute any instrument that may be necessary to vest completely in her or them all his right, title, and interest in and to the above described shares of stock herein assigned or intended to be assigned.

"It is further understood that the said 600 shares herein referred to, of said G. M. Barrett Company, owned by said party of the first part, have been and now are, with the consent of said party of the second part, in escrow or pledge to *Germania National Bank* as and for security and pledge for the certain indebtedness of said G. M. Barrett Company to said *Germania National Bank,* amounting to a sum not exceeding $10,000.

"In witness whereof the parties hereto have hereunto set their hands and seals at Milwaukee, Wisconsin, this 4th day of January, 1913. JOHN P. MILEY.

"E. A. HEANEY."

These documents, upon their face, seem to constitute a full and complete transaction and, taken together, express all the terms of the agreement between the parties. *Helen Heaney* executes her notes to *Miley* for $110,000; to secure those notes she executes an assignment of her interest in the Jung estate, in which it is recited in effect that in payment of said 600 shares the said *Helen Heaney* has executed her fifteen certain promissory notes for the aggregate sum of $110,000; then, in another and separate instrument, *Miley* assigns the stock to her. We must hold that these instruments, taken together, constitute a complete written contract, the terms of which cannot be varied by parol evidence. *Sigerson v. Cushing,* 14 Wis. 527. Under the circumstances, it was incumbent upon *Miley* to see that the full understanding between himself and *Mrs. Heaney* was embodied in the written contract. He cannot now claim, especially in this action, that the written contract does not correctly express the terms of the agreement between them, and cannot modify its provisions by parol evidence.

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Helen Heaney also makes point of the fact that the stock was not immediately delivered to her, but that it remained for some time on deposit with the *Germania National Bank* as collateral security for certain notes of *Miley* and the Barrett Company. We can see no point to this contention. The stock was eventually delivered to her and she subsequently came into full physical possession of it. If she ever had the right to rescind the contract because of the failure to deliver the stock, she did not exercise that right before the stock was delivered, and certainly she could not exercise it thereafter. It is argued in her brief that this is another point upon which the minds of the parties did not meet, as it was no part of the understanding that the stock should continue in pledge as collateral security. The assignment of the stock which *Miley* delivered to her contains this provision: "It is further understood that the said 600 shares herein referred to, of said G. M. Barrett Company, owned by said party of the first part, have been and now are, *with the consent of said party of the second part,* in escrow or pledge to *Germania National Bank* as and for security and pledge for the certain indebtedness of said G. M. Barrett Company to said *Germania National Bank.*" She must be presumed to have had knowledge of this provision of the assignment, and, fairly construed, it gives her consent to a continuation of the pledge. In any event she has not been harmed by the fact that the stock remained pledged for a time, and we cannot regard the incident as of any importance nor accord to the contention any merit.

It is claimed by *Mrs. Heaney* that the *Germania National Bank* and the *Kneeland-West Lumber Company* were not holders in due course of the notes transferred to them by *Miley*. In view of the fact that no infirmities are found with reference to the notes, it seems unnecessary to consider that question further. *Mrs. Heaney* has no defense to the notes either in the hands of *Miley* or any one else.

Helen Heaney demanded a jury trial upon the issue of fraud raised in her answer to the complaint and on her

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counterclaim. This demand was refused by the court. She assigns such refusal as error, although it is not argued or discussed in the brief. It will be noticed that this is an equitable action. It is brought for the purpose of foreclosing the lien upon *Helen Heaney's* share of Philipp Jung's estate arising from her execution of the assignment to *Miley* as collateral security for her notes. Her defense is that she was induced to sign the notes by reason of fraud perpetrated upon her, and in her counterclaim she asks that such notes be surrendered and canceled because of such fraud. We had supposed it was well settled in this state that all issues arising in an equitable action, and especially questions which directly involve the right to equitable relief, are triable by the court, and that neither party has a right to have such issues tried by a jury. *Stilwell v. Kellogg,* 14 Wis. 461; *Connecticut Mut. L. Ins. Co. v. Cross,* 18 Wis. 109; *Truman v. McCollum,* 20 Wis. 360; *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 138 N. W. 102. In view of the fact that this question was not urged in the brief, we shall indulge in no further discussion thereof.

We will now consider the issues arising upon the cross-complaint of the *First Trust Company.* As already stated, the G. M. Barrett Company was declared bankrupt, and the *First Trust Company* was appointed trustee in bankruptcy on the 19th day of March, 1915. Upon motion and order it was made a defendant herein. It has already been stated that at the time of the transfer of *Miley's* stock to *Helen Heaney* he was indebted to the Barrett Company in the sum of approximately $15,000, and that after such transfer, pursuant to an agreement made between *Helen Heaney,* E. A. Heaney, and *John P. Miley,* he continued to procure cash and merchandise from the store on the credit of *Helen Heaney,* such advances to be credited by him on *Helen Heaney's* indebtedness to him. The court found that the amount of such advances in cash and merchandise so made between the 4th day of January, 1913, and the 26th day of December, 1914, was $13,263.16. He also found that in

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addition to said sum of $13,263.16 there was paid by the Barrett Company for the defendant *Helen Heaney,* upon the indebtedness evidenced by the aforesaid notes, on and between July 5, 1914, and December 26, 1914, to parties other than the plaintiff *Miley,* the sum of $10,656.88, as follows: $5,150 on July 5, 1913, to Merchants & Manufacturers Bank of Milwaukee, in payment of a $5,000 note of *Helen Heaney* to *Miley* and deposited with said bank as collateral security; $2,250 on and between February 3, 1914, and April 4, 1914, to the Marshall & Ilsley Bank of Milwaukee, being the principal of three notes of $750 each, executed by the defendant E. A. Heaney for and on account of the defendant *Helen Heaney,* in part payment of the notes mentioned in the complaint, the said three notes of $750 each being at the time of payment thereof held by said bank; $500 on December 26, 1914, to Marshall & Ilsley Bank to apply on a like note held by said bank; $2,000 on July 6, 1914, to the *Germania National Bank* in part payment of the Killilea note for $5,000, maturing July 4, 1914, which was then held by said bank; $256.88 on September 2, 1914, to the *Germania National Bank* in part payment of the same note of *Helen Heaney* held by said bank; $250 on October 5, 1914, and $25 on October 12, 1914, to the Jonas Automobile Company in payment of an indebtedness of said *Miley* to said Automobile Company.

The *First Trust Company* sought a judgment against *Mrs. Heaney* and *Miley* for all of said indebtedness. The court awarded judgment against *Miley* for the sum of $15,455.12, the amount of the book account due from said *Miley* to the Barrett Company on the 4th day of January, 1913, and against *Mrs. Heaney* for the sum of $20,720.04, being the amount of advances made from the assets of the Barrett Company for and on account of *Mrs. Heaney's* indebtedness to *Miley* as above itemized, less credit of $1,200, her salary for one year as vice-president, and $2,000 in cash paid in by *Mrs. Heaney* to apply on her account, the same be-

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ing the income from her father's estate. From this judgment the *First Trust Company* appeals, and claims it is entitled to judgment against *Mrs. Heaney* as well as *Miley* for the $15,455.12, the amount of *Miley's* book account on January 4, 1913, and that it is entitled to judgment against *Miley* as well as *Mrs. Heaney* for $16,263.14 of the $20,720.04 for which it recovered judgment against *Mrs. Heaney*. *Miley* appeals from the judgment, and claims that he is not liable for the $15,455.12 because the same was assumed by *Mrs. Heaney* to apply on the purchase price of his stock. *Mrs. Heaney* claims that she is not liable for the advances made by the Barrett Company and charged to her, for which judgment in the amount of $20,720.04 was rendered against her. It thus appears that upon the issues raised by the cross-complaint none of the parties are satisfied with the judgment.

We have already decided that *Mrs. Heaney* did not assume or agree to pay the amount of *Miley's* indebtedness to the Barrett Company at the time of the transfer of his stock to her and that she never made any agreement to assume or agree to pay it. In the absence of any such agreement, neither the Barrett Company nor the trustee in bankruptcy has the least foundation for a claim against her for such indebtedness, and in the absence of such an assumption of said indebtedness by her there is no foundation for the claim made by *Miley* that he does not owe it. There was not a novation, because *Mrs. Heaney* did not agree to pay the debt; and there could not be a discharge of *Miley's* liability, because of a lack of consideration and want of power on the part of the officers of the Barrett Company to give away the assets of the corporation. This part of the judgment must therefore be affirmed.

The court found that after the transfer of the stock by *Miley* to *Helen Heaney* she constituted E. A. Heaney her agent to represent her in the management of the Barrett Company business and in the care of her interest therein, and to

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arrange for the payment of her said notes to the plaintiff *Miley* as the same became due. We approve of this finding. The trial court further found that it was thereupon agreed between her and the said *Miley* and the managing agents of the G. M. Barrett Company that the said G. M. Barrett Company would pay and deliver to said *Miley* moneys and merchandise upon her credit and responsibility, and as an advance upon her share of anticipated net earnings of the business, sufficient to meet the interest and principal upon said notes as the same became due, and that the amounts of said money and merchandise should be charged to her on the books of the company and applied by said *Miley* in the reduction of her indebtedness represented by said notes, and that pursuant thereto there was delivered to *Miley* cash and merchandise to the amount of $13,263.16. As was further found by the trial court:

"These withdrawals were, of course, directly for the benefit of both the Heaneys, and Mr. Heaney, as manager of the business, was in no position alone to authorize this irregular way of drawing earnings in advance of dividend for his own benefit and for the benefit of his wife. This was more than a simple extension of credit to *Mrs. Heaney* on sales of goods in the usual course of business. It was not a simple delivery of goods to A. on the credit of B. in the usual course of merchandising, which a manager would be fully authorized to do without consulting directors. It amounted to making large loans of the assets of the company as a favor to majority stockholders and would plainly be beyond the power of Mr. Heaney as manager, especially in view of his personal interest in it, and would constitute a misappropriation for which the Heaneys and *Miley* would all have been liable were it not for the practice having been followed for many years with the approbation of all stockholders."

We agree with the trial court that the transaction was not a usual one in the ordinary course of business where a managing officer could bind the corporation. We have little difficulty in arriving at the conclusion that this arrangement

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could have been made binding upon the Barrett Company, if at all, only by proper action of the board of directors. At the time of the sale the directors of the company consisted of *Miley,* Heaney, and Barrett. While it is argued that *Miley* ceased to be a director on sale of his stock by force of sec. 1776 of the Statutes, it appears nevertheless that he continued to act as director and president of the company until August 5, 1913, at which time *Helen Heaney,* E. A. Heaney, and John D. Kemper were elected directors of the company. Neither the first nor the last board of directors had power to bind the company in this manner, for the reason that a majority of both boards of directors were interested in the contract adversely to the interests of the corporation.

"The directors of a corporation are not permitted to use their position of trust and confidence to further their private interests, nor to become parties to contracts concerning corporate affairs intrusted to their management which conflict with a free and impartial discharge of their duties toward the stockholders. Any participation by them in contracts dealing with matters of corporate interest which is antagonistic to their free and impartial discharge of official duties is denounced by the law, unless all of the stockholders with full knowledge assent thereto." *Timme v. Kopmeier,* 162 Wis. 571, 576, 156 N. W. 961.

This seems to have been appreciated by the trial court, and he justifies the arrangement upon the theory that all stockholders had knowledge of the fact that such advances were being made and acquiesced therein. His finding to this effect is as follows:

"From 1902 to 1910, inclusive, the directors of the G. M. Barrett Company declared no dividends, although the company during that period made large earnings. During this period, and before, the custom prevailed of allowing the stockholders to obtain advances as needed or asked for, and the amounts thereof were charged upon their open accounts. From time to time statements were made showing the surplus accumulated by the company and the interest of each

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stockholder therein, and said advances were intended as a means of distribution of such surplus. By these means the books showed that each stockholder was apparently heavily indebted to the company, *Miley's* apparent indebtedness exceeding $73,000, which sum was mainly used by him to pay indebtedness incurred in his purchase from Barrett. In 1910 a 100 per cent. dividend was declared and these book accounts thereby wiped out and the surplus reduced. Thereafter the custom of making similar advances was continued and no further dividend was declared during the continuance of the company in business. This custom was well known to all holders of common stock and was assented to by them. Regular annual statements of the business and financial condition of the company were prepared in January of each year, and each stockholder informed thereof, until the year 1915, when the G. M. Barrett Company was forced into bankruptcy. All stockholders, including the one holder of preferred stock, must be presumed to have had knowledge of the contents of the books and the custom aforesaid of making advances to stockholders, and no objection thereto was ever made."

We do not think the custom prevailing from 1902 to 1910 of allowing stockholders to obtain advances as needed or asked for and the amounts thereof charged on their open account, such advances being treated as in lieu of dividends, can be construed as an acquiescence on the part of the stockholders in the advances made to *Miley* upon the credit of *Helen Heaney*. In the first place, prior to 1910 the Barrett Company was earning dividends, and the advances made were reasonably proportioned to the earnings to which the stockholders were entitled. After the sale the company earned little if any money. The advances made to *Miley* upon the credit of *Helen Heaney* were altogether out of proportion to anything she was entitled to receive from the company in the way of dividends. They were loans, pure and simple, of large amounts of money, and cannot be compared with the reasonable credit or advances allowed stockholders at a time when the company was in a prosperous condition. It was an attempt to finance her undertaking out of

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the assets of the Barrett Company. In order to charge the stockholders with knowledge of and acquiescence in these loans direct knowledge thereof must be shown.

The trial court found that all stockholders, except the Germania Publishing Company, the owner of fifty shares of the preferred stock of the company, did have actual knowledge of these loans. In order to charge the Germania Publishing Company with such knowledge the trial court evidently relied upon an erroneous principle of law, as indicated by the following sentence: "All stockholders, including the one holder of preferred stock, must be presumed to have had knowledge of the contents of the books and the custom aforesaid of making advances to stockholders, and no objection thereto was ever made." We know of no principle of law which charges stockholders with knowledge of the contents of or entries in the ordinary financial books of account of a corporation. Such a rule would be a very harsh one indeed and, to our minds, could not be grounded upon any conceivable reason. It is well known that stockholders of a corporation are frequently scattered far and wide, and that as a matter of fact few of them do, or have the opportunity to, examine the books of account of a corporation. Assuming that annual statements couched in general terms in the form of reports may be made to the stockholders, such statements are seldom in sufficient detail to apprise them of transactions of this character. There being no finding that the Germania Publishing Company had notice of these transactions, and in fact no evidence upon which such finding could be based, it necessarily follows that the agreement pursuant to which the assets of the company were applied in discharge of *Helen Heaney's* indebtedness to *Miley* was without any legitimate authority to support it and was not binding upon the Barrett Company. It follows, also, that the assets of the company used for this purpose were unlawfully diverted, and that *Miley*, who received the same with full knowledge of all the facts and circumstances, is liable for their restoration to the company. This applies to

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the open book account representing the amount of cash and merchandise so paid and delivered to *Miley* upon the credit of *Helen Heaney,* which the court found to be $13,263.16.

It also appears that in addition to this amount there was delivered to *Miley* July 6, 1914, payable to his order, the check of the Barrett Company for $2,000 to be applied by *Miley* in payment of one of *Helen Heaney's* notes for $5,000 which *Miley* had deposited with the *Germania National Bank* as collateral security; that there was also delivered to *Miley* in cash by the Barrett Company in December, 1914, the sum of $500 to be applied on one of *Mrs. Heaney's* notes then held by *Miley.* It seems plain to us that these two items are on the same footing as other cash and merchandise delivered to *Miley.* Although *Miley* had deposited the $5,000 note at the *Germania National Bank* for collateral security, he had by no means parted with all interest therein. He was as much interested in the payment of the note after as he was before the deposit. The $2,000 check, therefore, was for *Miley's* benefit, and he is as much responsible for that as for any other item, either cash or merchandise, delivered to him. The court also found that $250 on October 5, 1914, and $250 on October 12, 1914, were paid by the Barrett Company to the Jonas Automobile Company. This is another item for which *Miley* is clearly liable. To the sum of $13,263.16, therefore, there should be added the $2,000 check of July 6, 1914, the $500 cash advanced in December, 1914, and the $500 paid to the Jonas Automobile Company, in all $16,263.16, for which the *First Trust Company* is entitled to a judgment against both *John P. Miley* and *Helen Heaney.* In view of the fact that *Mrs. Heaney* has been credited with this amount on her indebtedness to *Miley,* it should be provided in the judgment that if *Miley* pays this amount he be subrogated to the rights of the *First Trust Company* against *Mrs. Heaney.*

On the 1st day of February, 1905, the G. M. Barrett Company executed its note to the *Germania National Bank*

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for $10,000, which was indorsed by *J. P. Miley* and the proceeds of said note credited to the account of G. M. Barrett Company. On the 2d day of February the G. M. Barrett Company executed its check for $10,000 to *J. P. Miley*. This note was renewed from time to time and was outstanding at the time of the bankruptcy of the G. M. Barrett Company. It was claimed by *Miley* that this note was executed by the G. M. Barrett Company for his accommodation, and that the indebtedness represented thereby was his and not that of the Barrett Company, primarily; that he was not the debtor of the Barrett Company by virtue of the transaction, but that the Barrett Company was merely his surety to the bank. The *First Trust Company* contended that *Miley* was the debtor of the Barrett Company, and sought to recover judgment for the entire sum of $10,000 represented by the check given to *Miley* on the 2d day of February, 1905. Upon this issue the court found as follows:

"On or about February 1, 1905, G. M. Barrett Company, for the accommodation of the plaintiff *Miley*, executed and delivered to the plaintiff *Germania National Bank* its promissory note for the sum of $10,000, for the purpose of enabling the said *Miley* to procure a loan from said bank for that amount, which loan was then and there made by the bank crediting to Barrett Company on its books $10,000 and by Barrett Company giving to *Miley* its check for $10,000. Payment of the indebtedness represented by said note and by the renewal thereof was on February 1, 1905, guaranteed to said bank by said *Miley* and three others, and said loan was made by said bank on the credit of said note and guaranty. Said note was renewed from time to time by notes of the G. M. Barrett Company, the last renewal thereof being a note for the sum of $10,000 executed by said company to said bank, dated September 28, 1914, due ninety days thereafter, bearing interest at the rate of seven per cent.

"Said *Miley* paid the interest which accrued on said original note and on all of the renewals thereof down to February 1, 1911, by means of checks of Barrett Company which were charged to *Miley* on books of Barrett Company.

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Thereafter, down to December 28, 1915, the interest accruing on said renewal notes was paid by said Barrett Company without being so charged. The amount of said interest thus paid by said company is $2,154.24.

"On March 16, 1915, upon due proceedings in that behalf had in the district court of the United States for the Eastern district of Wisconsin, said G. M. Barrett Company was duly adjudged a bankrupt. Thereupon the defendant *First Trust Company* was by said court duly appointed trustee in bankruptcy of said G. M. Barrett Company and has duly qualified and is in discharge of its duties.

"The plaintiff bank proved up its claim on said note of the G. M. Barrett Company for $10,000, dated September 28, 1914, against said company in the bankruptcy proceedings at the sum of $10,042, being the principal of said note with interest thereon from December 28, 1914. There has since been paid to said bank thereon by said trustee the following dividends: April 22, 1914, $2,510.50; April 11, 1915, $301.36; total, $2,811.86."

The court ordered judgment against *Miley* on account of this transaction for the sum of $2,154.24, the amount of interest paid on said note by the G. M. Barrett Company, together with interest thereon, and for the sum of $2,811.86, the amount of dividends paid in bankruptcy proceedings to the plaintiff bank upon the note of said Barrett Company, together with interest on the items of said dividend from the date of payment to the date of judgment. As already stated, the *First Trust Company* complains of such disposition of this transaction, and contends that it is entitled to judgment for the entire sum of $10,000 with interest. We think the finding of the trial court to the effect that the original note given by the Barrett Company was merely for the accommodation of *Miley,* and that *Miley* did not become the debtor of the Barrett Company by virtue of the transaction, is fully sustained by the evidence, and that the disposition made by the trial court of this item cannot be disturbed.

It is earnestly contended that the trustee in bankruptcy cannot maintain an action for the recovery of these various sums so unlawfully diverted from the assets of the Barrett

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Company to *John P. Miley*. We think there can be little doubt of the right of the trustee in bankruptcy to maintain this action. It is well settled that an action can be maintained by the corporation to recover its assets which have been unlawfully diverted in this manner. *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 185, 186, 116 N. W. 900. It is well settled that the trustee in bankruptcy takes such rights and interests in the property of the bankrupt as the bankrupt himself had. The Barrett Company had the right at any time to bring an action against *Miley* for the amount of these unlawful diversions, and, upon the appointment of a trustee in bankruptcy, we have no doubt of the right of the trustee to maintain the action to recover the same when necessary, as here, to liquidate the claims of creditors against the corporation. There can be no doubt of this in view of secs. 70 *a* and 47 *a* (2) of the federal bankruptcy act.

From what we have said it follows that the judgment should be affirmed on the appeals of *Helen Heaney* and *John P. Miley*. Upon the appeal of the *First Trust Company* the judgment should be modified, providing for a joint recovery against *Helen Heaney* and *John P. Miley* for the sum of $16,263.16 and against *Helen Heaney*, individually, of $4,456.88, interest, to be computed as indicated by the trial court in its findings of fact and conclusions of law.

By the Court.—Judgment affirmed upon appeals of *Helen Heaney* and *John P. Miley*. Upon the appeal of the *First Trust Company* the judgment is modified as indicated in the opinion, and, as so modified, is affirmed. *John P. Miley* to recover full costs against *Helen Heaney*. The *First Trust Company* to recover costs for printing its briefs against *John P. Miley*. No other costs to be taxed.

KERWIN and ESCHWEILER, JJ., dissent.

A motion for a rehearing, made on behalf of the plaintiffs, and a like motion made on behalf of the defendant *Helen Heaney*, were denied on November 6, 1918, without costs, except clerk's fees to be paid by plaintiffs.

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NYHAGEN, Administrator, Appellant, vs. MARKHAM and wife, Respondents.

October 8—November 6, 1918.

Deeds: Parent and child: Fraud: Undue influence: Evidence.

In an action to set aside a conveyance by an aged woman, for a small consideration, of a large part of her property to her daughter (one of five children), findings by the trial court to the effect that the deed was not procured by fraud or undue influence of the grantee or her husband, an attorney, are *held* to be sustained by the evidence, both the grantor's susceptibility to such influence and the disposition of the defendants to exercise it being disproved.

APPEAL from a judgment of the circuit court for Manitowoc county: JAMES O'NEILL, Judge. *Affirmed.*

Action in equity originally brought by Cornelia E. Windiate to set aside, on the ground of fraud, a deed of 116 acres of farm land which she had executed and delivered to her daughter, the defendant *Ida E. Markham.* After trial and before judgment Cornelia died and her administrator was substituted as plaintiff and brings this appeal from judgment negativing fraud and dismissing the complaint.

The facts are in brief as follows: Cornelia Windiate and her husband, Thomas Windiate, lived in Manitowoc many years and successfully operated a hotel, from which business they retired in 1910, the husband having accumulated an estate of about $30,000 and the wife having in her own name the land in question near Manitowoc, worth somewhere from $15,000 to $18,000, and a small house and lot in the city of Manitowoc. The husband died in 1911 at the age of eighty-four years, intestate. The wife continued to live at the homestead in Manitowoc. She was the administratrix of her husband's estate and settled it with the advice and assistance of the defendant *Herbert L. Markham,* husband of *Ida,* a lawyer at Manitowoc. There were five children, all adults, viz. the defendant *Ida,* the eldest, Belle,

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wife of the plaintiff, a banker at Manitowoc, Cornelia Paine, a widow with six children living at Oil City, Pennsylvania, Bert, a steamfitter, married and living in Chicago, and Thomas, a clergyman, unmarried and living at Monterey, Tennessee, where he conducted a church school and hospital. All of the children were on excellent terms with their mother. *Ida* and Belle lived near her in Manitowoc, and she was frequently with them, sometimes taking her meals with one or the other for considerable periods. She visited her son Thomas at Monterey during the winters of 1914-15 and 1915-16. The farm in question was rented to the son Bert in January, 1909, but he left it in 1911, after his father's death, and thereafter seventy-three acres thereof was rented to the Pea Canners Association at an annual rental of $9 per acre, *Herbert Markham* renting the balance, consisting of pasture and garden, at $50 per annum. Mrs. Windiate was on excellent terms with her two sons-in-law at Manitowoc. *Markham* drew her leases, collected some rents, took care of the insurance, and advised her generally, while *Nyhagen* kept her accounts at the bank and had general care of her finances. She never questioned the acts of either. Her memory was somewhat impaired during her later years, but her competency to transact business is not now questioned. In May, 1915, the defendant *Herbert Markham* made a written offer to purchase the farm, the terms proposed being to surrender *Ida's* share of the father's estate to the other heirs and give a mortgage of $5,000 to the mother, but this was never accepted. In the summer of 1916 Mrs. Windiate frequently asked her daughter Belle if it would be a fair division if she gave *Ida* the farm in question, and Belle told her it would not. Several times during 1915 and 1916 she suggested to the defendant *Herbert* that she would deed the farm to him and asked him to draw a deed, but he told her that it would make trouble, that the other heirs would make a fuss, and declined to do it. On the evening of August 21st she went from her residence

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in Manitowoc to the summer cottage of the *Markhams,* on the farm in question, and stayed all night and had a long talk with *Ida,* and proposed to deed her the farm for $1,000. The evidence shows that *Ida* endeavored to dissuade her, pointing out that the heirs would object, that there would be trouble, and that her mother would lose her main support; to which the mother replied that she would tell the children to mind their own affairs, that she had the rent of the homestead and of her other house in town, had money in the bank, and that Tom had $400 at interest for her. *Ida* then objected that she did not have the cash to make the $1,000 payment, but said she had a $1,200 note given by her husband which she could turn over, and her mother consented to take it. On the following day *Mr. Markham* went to Algoma, and *Mrs. Markham,* at her mother's request, hitched the horse to a buggy and with her own three daughters drove to Manitowoc to the office of Judge Baensch. After waiting a time they saw the judge and he drew the deed and it was duly executed. Judge Baensch had known all the parties for years and testified that Mrs. Windiate was an unusually bright and active woman and was as bright at that time as ever and well preserved mentally. The deed was not put on record at once, as Mrs. Windiate said she wished to tell the other children of the transaction herself. A few days afterward *Ida* gave her mother her husband's note for $1,000. Belle learned of the deed about two weeks after it was executed, by the publication of the fact of the recording thereof in the local newspaper. At once there was objection by Belle and Thomas and Bert. Much ill feeling developed, and on September 14th Thomas took his mother to Tennessee, where she remained all winter, and neither of the defendants was permitted to talk with her again. This action was commenced October 28, 1916, claiming to set aside the deed because, as alleged in the complaint, the defendants had taken advantage of her trust and confidence in them and of her ignorance of business and of their influence over

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her and thus procured the execution of the deed. Mrs. Windiate's deposition was taken in Tennessee in January, 1916, and she was examined orally as a witness on the trial in April just prior to her death. She was eighty-one years of age and quite feeble and her memory was quite defective. She remembered the giving of the deed, stated that she made it of her own free will, denied that *Ida* urged her to sign it or tricked her into it, claimed that she always desired to divide the land equally and did not understand that by the giving of the deed *Ida* would get a larger share than the other children, and that she wanted the land back in her own name. In September, 1916, *Ida* deeded the land to a third person, who at once deeded it to *Mr.* and *Mrs. Markham* and to the survivor of them.

The trial court found that when the plaintiff executed the deed she was entirely capable of understanding the nature of the act and of exercising an intelligent judgment, and that she executed it freely and voluntarily in pursuance of a purpose which she had entertained for a considerable time; that neither of the defendants made any false representations or was guilty of any fraud or undue influence in the matter; that it had been understood in the family that each child should share equally in the estate and that such was the expectation of Mrs. Windiate, but that "for reasons disclosed by the evidence the deceased concluded to give this farm to her said daughter." To these findings the trial judge added a statement that he believed the mother thought the heirs would in some way make the division equal, and this probably would have been done but for the unfortunate differences which arose soon after the deed was executed.

For the appellant there were briefs by *Nash & Nash* of Manitowoc, attorneys, and *Geo. G. Greene* and *Jerome R. North* of Green Bay, of counsel, and oral argument by *Mr. North.*

For the respondents there was a brief by *Hougen & Brady* of Manitowoc, and oral argument by *A. L. Hougen.*

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WINSLOW, C. J. There was no direct affirmative evidence of fraud or undue influence in the present case. The rule is very well settled in this court that, in case of a conveyance by an aged person of substantially his entire property without consideration to one in a position of trust and confidence, if it be shown (1) that the grantor was unquestionably susceptible to undue influence, (2) that there was opportunity for such influence, (3) that there was a disposition on the part of the grantee to exercise it, and (4) that the result clearly appears to be the effect of the supposed influence, a *prima facie* case of fraud is made out, which must be met by affirmative evidence establishing the good faith of the transaction or it will prevail. *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939; *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220; *Quinn v. Quinn,* 130 Wis. 548, 110 N. W. 488.

Doubtless the trial judge tested the present case by this rule and found that the case required had not been made. Careful reading of the record convinces us, not merely that the evidence does not preponderate against the trial judge's conclusions, but that they are sustained by the evidence. While there was unquestionably the confidential relationship and the opportunity for the exercise of undue influence, the evidence entirely fails to show that the grantor was susceptible to such influence or that there was any disposition on the part of the defendants to exercise it. On the contrary, both propositions seem to us to be disproved by affirmative evidence.

By the Court.—Judgment affirmed.

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TWO RIVERS DREDGE & DOCK COMPANY, Respondent, vs. MARYLAND CASUALTY COMPANY OF BALTIMORE, Appellant.

October 8—November 6, 1918.

Insurance: Employer's liability: Indemnity for payment under workmen's compensation law: Estoppel.

1. In an insurance policy providing for indemnity against loss from the liability imposed by law on account of accidental injuries suffered by employees of the insured in certain places, including the state of Ohio, it was stipulated that "unless specifically indorsed hereon, this policy does not cover any obligation . . . imposed upon the assured by any workmen's compensation . . . law." A workmen's compensation law previously enacted in Ohio went into effect after the policy was issued. The insurer knew and the assured was ignorant of that law, but no deception was charged. *Held,* that the insurer was not estopped to deny its liability in respect to a payment which the insured was obliged to make to an employee under said Ohio law.
2. Since the premium paid on said policy at no time included a charge for indemnity against loss imposed by workmen's compensation laws, the retention of the premium by the insurer could not operate to invalidate the stipulation excluding such indemnity.
3. While a forfeiture of benefits contracted for may be waived, the doctrine of waiver or estoppel cannot be successfully invoked to create a liability for benefits not contracted for at all.

APPEAL from an order of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This is an action brought by the plaintiff to compel the defendant to indemnify the plaintiff on a contractor's employer's policy. In this contract, dated June 28, 1913, the defendant agreed to indemnify the assured "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any employee of the assured while engaged in the occupation and at the places mentioned" in the policy and occurring within the year from the date of the policy and ending June 28, 1914. The policy

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covered work performed on plaintiff's dredges and tugboats operating on the Great Lakes and the rivers in Wisconsin, Ohio, and Pennsylvania. One of the provisions of the policy reads as follows: "Unless specifically indorsed thereon, this policy does not cover any obligation assumed by or imposed upon the assured by any workmen's compensation agreement, plan, or law." On September 1, 1913, an indorsement was made in writing on the policy that "this policy is extended to cover the liability of the assured" under the Wisconsin workmen's compensation law.

The defendant claims that under the provisions of the policy it is not obligated to plaintiff upon any liability imposed by the workmen's compensation act of Ohio, and hence is not liable to indemnify plaintiff for any loss sustained by plaintiff under such compensation act.

The complaint asserts that on June 15, 1914, at Cleveland, Ohio, while the policy was in force, an employee of the plaintiff, Michael Tinker, was accidentally drowned while in discharge of his duties and while performing work for the plaintiff mentioned in the policy; that claim for compensation was duly filed by Tinker's mother and his legal representatives with the industrial commission of Ohio; that the commission made its award adjudging that the plaintiff pay as compensation on said claim $2,143.33 and also $95 funeral expenses; that plaintiff has paid this award in full; that defendant refused to defend against the claim and to pay the award or any part thereof and refused to indemnify plaintiff for having paid the same.

The complaint further alleges that there was full compliance on the plaintiff's part with every requirement of the policy essential to recovery if, at the time of its occurrence, the accident in question was covered by the policy; that the workmen's compensation act of Ohio went into effect January 1, 1914, long after the date of the policy; that the defendant knew of the law from the time of its passage, while the plaintiff had no knowledge thereof prior to said acci-

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dent, and that defendant up to the time of said accident never informed plaintiff of the existence of such a law and never canceled the policy nor returned or offered to return any part of the premium paid therefor; that while the policy was executed and delivered at Two Rivers, Wisconsin, the place of plaintiff's location and office and principal business, the plaintiff was assured by defendant's local agent and its general agents in Milwaukee that the policy covered all accidents to plaintiff's employees in Ohio; that after the accident defendant's general agents in Milwaukee requested plaintiff to send one of its officers to Milwaukee to make proof of loss on account of the accident; that plaintiff did so, thereby incurring expenses of $8 in making such proof, which was sent to defendant, and plaintiff was assured by defendant's agents that the defendant would indemnify plaintiff for the accident; that in 1913 and 1914 and thereafter it was the general custom in Wisconsin for corporations which issued such indemnity policies to give notice immediately to the assured of any fact or event which would change or nullify such a policy, and that plaintiff relied upon that custom, but that defendant never gave plaintiff notice that the policy had been invalidated by any law of Ohio or that defendant would not perform the contract on its part.

The defendant demurred to the complaint on the ground that it appears on the face of the complaint that the same does not state sufficient facts to constitute a cause of action. The trial court overruled the demurrer, from which order appeal is taken by the defendant to this court.

The cause was submitted for the appellant on the brief of *Robert R. Freeman,* attorney, and *Henry J. Bendinger,* of counsel, both of Milwaukee, and for the respondent on that of *Markham & Markham* and *Hougen & Brady,* all of Manitowoc.

SIEBECKER, J. The trial court held that the defendant is estopped from taking advantage of the provision of the policy excluding indemnity for obligation imposed on plaint-

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iff by any "workmen's compensation agreement, plan, or law." This ruling by the court is based on the grounds that, from the time its contract was made, the defendant knew, and the plaintiff was ignorant of, the existence of the Ohio workmen's compensation law, and therefore plaintiff believed that it was fully indemnified against loss imposed by law upon it for damages resulting from accidents suffered by its employees in the state of Ohio. It is to be borne in mind that the complaint does not charge that the plaintiff was deceived into making the agreement that the policy did not cover any obligation assumed or imposed by any workmen's compensation law. The complaint admits this stipulation was a part of the policy as accepted by it, but claims that the existence of such Ohio law resulted in destroying all indemnity it had originally secured by the policy, and that its ignorance of such fact, which was known to defendant, estops defendant from relying on this stipulation in the policy.

It is not correct to say, as the trial court seemingly held, that the concealment and assurances of defendant's agents that the policy as written covered all accidents to its employees in the state of Ohio affects the validity of this stipulation in the policy. The plaintiff understood and accepted this stipulation in the policy. There is nothing in the conduct of the parties to justify the conclusion that the plaintiff was led to believe that this stipulation did not cover any obligation imposed on plaintiff by the Ohio workmen's compensation law. To enforce an estoppel as claimed by plaintiff would not only nullify a part of the policy agreed to by both parties, but would also operate to extend the contract to a liability which the parties understood and expressly agreed should not be covered by the contract. As was stated in a recent case in this court:

"The objection here does not go to the validity of the policy, which might be overcome by the larger evident intention that indemnity was intended, nor to a forfeiture or loss

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of a right or claim thereunder, but concerns only the scope of the insurance. . . . There might be waiver of a forfeiture or of a breach of contract, but waiver as a ground for extending the scope of a written contract beyond the usual and ordinary meaning of the language employed would be quite a novelty." *Rosenthal v. Ins. Co. of N. A.* 158 Wis. 550, 149 N. W. 155.

We are cited to *Welch v. Fire Asso.* 120 Wis. 456, 98 N. W. 227, and other authorities in this court on which the trial court placed reliance in sustaining the complaint. These authorities deal with instances where stipulations in policies were held ineffective upon the ground that the act and conduct of the parties showed an intent that indemnity was intended to be given though such provision expressed a contrary intent and where forfeitures and loss of rights thereunder had been waived by the acts of the insurer.

"While a forfeiture of benefits contracted for may be waived, the doctrine of waiver or estoppel cannot be successfully invoked to create a liability for benefits not contracted for at all." *McCoy v. Northwestern M. R. Asso.* 92 Wis. 577, 585, 66 N. W. 697.

The contention that retention by defendant of the full premium paid for the policy for the period of one year operated to invalidate the provision excluding indemnity of liabilities imposed by the workmen's compensation law of Ohio, is not well founded, since the premium was paid for indemnity provided by the terms of the policy, which persisted to the end of the policy period, and at no time included a charge for indemnity against loss imposed by the workmen's compensation laws. It follows that it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action.

By the Court.—The order appealed from is reversed, and the cause remanded to the circuit court with direction to enter an order sustaining the demurrer.

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PUHR, Administratrix, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY and another, Respondents.

October 8—November 6, 1918.

Appeal: Orders: New trial: Discretion: Order for judgment.

1. Unless there was an abuse of discretion an order granting a new trial will not be disturbed and the appeal therefrom will be dismissed.
2. An order for judgment dismissing an action against one of several defendants is not appealable under sec. 3069, Stats. Even if such an order could be considered a judgment it would not be a final judgment.

APPEAL from orders of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Dismissed.*

For the appellant there was a brief by *Hope Thompson* of Chicago and *Kelley & Wyseman* of Manitowoc, and oral argument by *Mr. Thompson.*

Edward M. Smart of Milwaukee, for the respondent *Chicago & Northwestern Railway Company.*

For the respondent *Lee,* administrator of the estate of Frank Kucera, deceased, there was a brief by *E. S. Schmitz* and *Healy & Joyce,* all of Manitowoc, and oral argument by *John J. Healy.*

KERWIN, J. This action was brought to recover damages resulting from a collision between an automobile owned by Frank Kucera, deceased, and a train of the defendant railway company, which occurred at a crossing at Two Rivers in the county of Manitowoc, Wisconsin.

The deceased, Frank Kucera, and wife, deceased, Frank Bauman and wife, and Theresa, daughter of Frank Bauman, were riding in an automobile, Bauman, his wife, and daughter having been invited to ride by Frank Kucera, deceased. All were killed in the collision except Theresa Bauman, who was severely injured.

The action was brought by the administratrix of Bauman, deceased, against the railway company and *George Lee,* ad-

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ministrator of the estate of Frank Kucera, deceased, on the ground of negligence of both the railway company and Frank Kucera. The trial resulted in a special verdict finding that the deceased, Frank Kucera, was not guilty of more than a slight want of ordinary care; that the speed of the train was twenty miles an hour, and that in running the train at that rate of speed the railway company failed to exercise ordinary care, and that the negligence of the railway company was a proximate cause of the injury and death of Frank Bauman; that the railway company's servants failed to use ordinary care to discover in time that the automobile was about to cross its track at the crossing in question, and that such failure was a proximate cause of the injury and death of said Bauman; that there was no want of ordinary care on the part of Frank Bauman which contributed to cause his death; that the damages awarded were as follows: to the daughter, Theresa Bauman, $4,590; to his daughter, *Anna Bauman Puhr,* $1,000; and to his son, John Bauman, $500.

The court below changed the answer of the jury on the question of slight want of ordinary care, holding that the deceased, Frank Kucera, was guilty of more than a slight want of ordinary care, and ordered judgment dismissing the action as to the railway company, and also ordered a new trial on the ground that the damages awarded were excessive. This appeal is from both orders.

The appellant here seeks to review the order granting a new trial as well as that dismissing the action as to the railway company, and assigns that the court erred in granting the motion of the railway company to change the jury's answer on the question of Frank Kucera's negligence; in ordering judgment in favor of the railway company dismissing the complaint; in ordering a new trial for defendant *George Lee,* administrator, etc.; and in not granting a motion of the plaintiff for judgment on the special verdict.

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The railway company contends, among other things, that the order for judgment in its favor is not appealable. The contention on the part of the administrator, *George Lee,* is that the court abused its discretion in granting a new trial.

It is well settled in this court that an order granting a new trial will not be disturbed unless there is an abuse of discretion. A careful examination of the record convinces us that there was no abuse of discretion in awarding a new trial, therefore the appeal from the order granting a new trial must be dismissed. *Pierson v. Citizens' T. & T. Co.* 135 Wis. 73, 115 N. W. 336; *Schlag v. C., M. & St. P. R. Co.* 152 Wis. 165, 139 N. W. 756.

It seems clear that the order dismissing the action against the railway company is not appealable. Appeals are purely statutory, and appeals from orders are regulated by sec. 3069, Stats. *Cook v. McComb,* 91 Wis. 445, 65 N. W. 181. The order is an order for judgment, therefore not appealable. *Murray v. Scribner,* 70 Wis. 228, 35 N. W. 311; *Joint School Dist. v. Kemen,* 68 Wis. 246, 32 N. W. 42; *Butteris v. Mifflin & Linden M. Co.* 133 Wis. 343, 113 N. W. 642; *Mills v. Conley,* 110 Wis. 525, 86 N. W. 203; *Treat v. Hiles,* 75 Wis. 265, 44 N. W. 1088; *Wolfgram v. Schoepke,* 123 Wis. 19, 100 N. W. 1054; *Ripon H. Co. v. Haas,* 141 Wis. 65, 123 N. W. 659.

Even if the order for judgment in favor of the railway company could be considered a judgment, still it would not be appealable, because not a final judgment. *Egaard v. Dahlke,* 109 Wis. 366, 85 N. W. 369; *Bakula v. Schwab,* 167 Wis. 546, 168 N. W. 378.

It would be well, if we had the power to do so, to review the order dismissing the action as to the railway company, but, appeals being statutory and this order not being included under the statute as an appealable order, we cannot review it upon the present appeal. Whether such orders should be made appealable is a proper matter for the con-

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sideration of the legislature, and it may be well for the legislature to give this subject such consideration as to it shall seem advisable.

By the Court.—The appeal from both orders is dismissed, with costs.

DEBRUINE, Respondent, vs. VOSKUIL and another, Appellants.

October 8—November 6, 1918.

Physicians and surgeons: Malpractice: Evidence: Instructions to jury: Choosing method of treatment: Negligence: Failure to use X-ray.

1. In an action for malpractice a verdict to the effect that the stiffened condition of plaintiff's ankle was caused by failure of defendants to use ordinary care and skill in the treatment of her fractured leg, the bone in which failed to unite properly, is *held* not to be sustained by the evidence.
2. Instructions in such case so broad that they permitted the jury to speculate as to the probable cause of plaintiff's injuries are *held* to have been erroneous.
3. Physicians are not compelled to choose at their peril between two accepted methods of treatment; and the statement of an expert that he would have treated the fracture of plaintiff's leg in a way different from that adopted by defendants was incompetent.
4. If the treatment adopted was such as physicians or surgeons of ordinary knowledge and skill, of the same school of medicine and practicing in the same vicinity, would have used, the mere fact that a bad result followed is not sufficient to show negligence.
5. Failure of defendants to make or procure an X-ray examination of the fractured bone is *held* in this case not to have amounted to negligence or unskilful treatment. [Under what circumstances an inference of negligence or unskilful treatment might be drawn from such a failure, is not determined.]

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. ***Reversed.***

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Malpractice. This action was brought to recover damages from the defendants, who are both physicians, for injuries alleged to have been sustained by reason of negligence on the part of the defendants in the care and treatment of a fracture of the tibia of the plaintiff's left leg. The plaintiff, a woman forty-nine years of age, on November 5, 1916, fractured the tibia of her left leg about two inches below the knee. The defendant *Voskuil* was sent for, and on arriving at plaintiff's house and ascertaining the difficulty sent for the defendant *Hess,* and together they reduced the fracture and placed it in a fracture box in the ordinary way with Buck's extension, attaching a weight of twenty-six pounds thereto. On December 20th the apparatus was removed by the defendant *Voskuil,* a part of the weight having been taken off one week previously. At the time of the removal of the apparatus the defendant *Voskuil* attempted to ascertain whether or not union had taken place, but desisted on account of complaints made by the plaintiff. He advised the plaintiff to use her leg. He called again on December 27th and then discovered that there was no union of the fragments. He then advised an operation for the purpose of fastening the ends of the bones together. Plaintiff was then taken to a hospital in the city of Sheboygan, where Dr. Arthur Genter performed an open operation and fastened the bones together by means of what is known as a Lane splint. Plaintiff remained in the hospital at Sheboygan for a period of ten weeks and then returned to her home. The bone was united perfectly, but plaintiff's left ankle was stiff as a result of the long disuse.

Plaintiff contends that defendants were negligent in the following respects: (1) In the application of a weight of twenty-six pounds to the broken leg, which caused the ends of the bones at the point of fracture to separate; (2) that the defendants discharged the plaintiff as cured on December 20th and directed the plaintiff to use her injured leg, when in fact there was no union and the fracture was

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not healed; (3) for the reason that the defendants did not call to see the plaintiff or inspect her leg for about eight days after removing the apparatus; (4) that no X-ray picture of plaintiff's broken leg was taken up to the time she was removed to the hospital on December 28th.

The case was submitted to the jury, and they returned a special verdict finding (1) that the defendants did not use ordinary care and skill as physicians and surgeons in the treatment of the fractured leg; (2) that the present stiffened condition of plaintiff's left ankle was the natural and probable result of the failure of the defendants to use ordinary care and skill; (3) that the plaintiff's failure to exercise ordinary care contributed to produce the present stiffened condition of her ankle; and (4) assessed plaintiff's damages at $1,800. There were seasonable motions on the part of the defendants, and after argument the court directed judgment for the plaintiff in the sum of $1,800, and from judgment rendered pursuant thereto both the defendants appeal.

For the appellants there was a brief by *Allen D. Young* of Sheboygan and *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Mr. Young* and by *Mr. Charles B. Quarles.*

Charles Voigt of Sheboygan, for the respondent.

ROSENBERRY, J. The errors assigned by the defendants raise the question whether or not there was sufficient evidence to sustain the verdict of the jury. In the first place it is to be noted that the plaintiff's claim to compensation is based upon the condition of her left ankle and for pain and suffering in so far as the same are due solely to the negligence found by the jury. The court did not submit to the jury the question of whether or not the failure of the bone to unite was due to the negligence of the defendants, but the damages are limited by the special verdict and the instructions of the court thereon to such damages as the plaintiff sustained by reason of the stiffened condition of her ankle and for pain and suffering as stated. The evi-

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dence very strongly supports the proposition that the defendants adopted a correct method of treatment and the one in ordinary use in the vicinity. It appears without dispute that in ordinary cases of fracture the healing is by means of an exudate at the ends of the bone which unites forming a soft tissue, then becoming bony and causing a permanent union. It is undisputed in this case that prior to the operation there was never any exudate on the ends of the bones. Dr. Crosby, expert for the plaintiff, said: "If the bones had been held somewhat apart there generally still is an attempt at union. In other words, nature would attempt to repair the broken fragments. It would send out callus, and if that can reach across, why, it might go together." All the medical testimony, including that of Dr. Crosby, shows that there are a certain percentage of cases in which nature makes no effort to unite the fragments, and there is no dispute that it was the situation in this case. The medical testimony further shows that there may be such a failure of nature in cases where absolutely correct treatment has been given and correct methods followed. There is no evidence to show that there was any greater stiffening of the ankle at the end of the seven weeks' period, when the extension was removed, than should be expected in cases of this character. Upon the trial it was stated that no claim was made of any negligence at or subsequent to the time of the removal of the plaintiff to the hospital, and that on the contrary the services of Dr. Genter were entirely proper and satisfactory.

It is established by the overwhelming weight of evidence in this case that the claimed negligence had nothing to do with the failure of nature to commence the healing process. If there had been a proper amount of exudate and it appeared that the failure of the fragments to unite was due to the fact that they were held so far apart that the ends could not be united, a different situation would be presented, but there is not a syllable of such testimony in the case. The

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failure of nature to commence a healing process is sometimes due to one cause and sometimes to another and sometimes no cause whatever can be assigned. It seems purely and wholly speculative to say that the non-union in this case was due in any degree to the negligence of the defendants.

The court instructed the jury on the first question as follows:

"Whether the broken ends of the bone were put in proper apposition by the doctors in the first instance; whether those ends were drawn apart or kept apart by the weights after the fracture had been reduced; whether it was negligence on the part of the defendants or of either of them to tell the plaintiff to use the leg on the assumption or belief—on the assumption or belief that the broken ends had become united, when the fact was that they were not united; whether in the disunited condition of the broken ends it was or was not negligence on the part of the defendants, or either of them, not to have called on the plaintiff within a period of about seven days after the weights had been removed and the leg had been released from the splints or box; whether the weights were too heavy; whether the left foot was or was not kept in a proper position while in the fracture box or in the splints; and whether the pull of the weights and the position of the left foot did or did not have anything to do with causing the present stiffened condition of the left ankle; and whether the omission on the defendants' part to take or cause to be taken an X-ray picture of the fracture before that was done, are each and all matters as to which the evidence relating thereto is to be considered by you in answering this first question."

To submit the issues in this case to the jury under such broad instructions as these is simply to permit the jury to speculate as to the probable cause of plaintiff's injuries. Dr. Crosby, plaintiff's expert, testified on his direct examination that proper treatment did not require the use of a weight, and described another method of treatment. He did not testify that the method adopted by the defendants was an improper method, and on cross-examination testified that Buck's extension apparatus was in general use in that vicin-

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ity for the treatment of fractures of the tibia. He also said that the amount of weight to be applied was a matter of judgment and depended upon the circumstances in each case. There is no evidence in the case to show that the bones were not properly placed in apposition to each other and there is no evidence to show that the weights were not properly attached in the usual and customary way. If an expert cannot say that the treatment was improper, upon what ground can the jury arrive at that conclusion? The fact being established that there was no union, it is assumed apparently that it must be due to some negligent treatment. The evidence does not sustain that view. The entire case here rests upon the testimony of a physician to the effect that he would have treated the fracture in another way. Physicians are not compelled to choose at their peril between two accepted methods of treatment. Statements of experts that they would have treated the fracture in some other way are incompetent. *Staloch v. Holm,* 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712. The whole evidence is that there is no ankylosis, properly so called, of the ankle joint, but the present stiffened condition of the plaintiff's foot is due to failure to use the foot and to a shortening of the cords, which can be remedied by use or by a simple operation.

The court further correctly instructed the jury:

"A physician and surgeon is not an insurer or guarantor of a cure. If the treatment in this case was such as physicians or surgeons of ordinary knowledge and skill, of the same school of medicine and practicing in the same vicinity, would have exercised under the same or similar circumstances, then the fact that a bad result followed from the treatment, if you find that that was the fact, is not in itself alone sufficient to charge the defendants or either of them with negligence."

The difficulty seems to be that the trial court entirely ignored the undisputed fact that the failure of the fragments to unite was due to some cause with which the treat-

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ment administered by the defendants had nothing whatever to do, that is, the failure of nature to set up the healing process. This failure of nature to act made necessary the operation and necessarily continued the period of disuse of the foot, to which the stiffening of the ankle joint was due. There being no evidence that the condition of the ankle joint at the time the dressings were removed was different in this case than it should have been in an ordinary case, there is no causal connection between the claimed negligence of the defendants and the injury sustained by the plaintiff.

There is one claim of negligence as to which there is sufficient evidence to sustain the finding of the jury, and that is that the defendant *Voskuil* was negligent in not discovering the fact that the injury had not healed at the time of the removal of the extension apparatus and in defendants' further failure to call upon the patient for seven or eight days thereafter. However, there is no evidence showing that this in any way contributed to or was a factor in producing the injury complained of. In fact, the attempted use of the leg during that week, so far as the stiffness of the ankle joint is concerned, would have been helpful rather than otherwise.

It is claimed that the defendants were negligent and guilty of careless and unskilful treatment of the plaintiff because they failed to cause an X-ray picture of plaintiff's broken leg to be made while they were treating it. At the time of her injury plaintiff lived at Cedar Grove. There was no X-ray apparatus at or near that place, and there was no suitable electrical current available. Neither does it appear from the testimony that, had an X-ray picture been taken during the treatment, it would have shown that no callus was being formed at the point of fracture. Notwithstanding, the court submitted to the jury the question whether or not the failure of the defendants to take or cause to be taken an X-ray picture was negligence on the part of the defendants. Plaintiff's attorneys cite us to no case holding

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that it is as a matter of law negligence for an attending physician and surgeon to fail to avail himself of the use of an X-ray apparatus in the case of fracture, and upon the facts shown here we cannot so hold, particularly as in this case it was comparatively easy to determine whether or not the ends of the bones were in apposition. *Snearly v. McCarthy* (Iowa) 161 N. W. 108; *Wells v. Ferry-Baker L. Co.* 57 Wash. 658, 107 Pac. 869, 29 L. R. A. N. S. 426. It does not appear at what stage of the healing period, if at all, an X-ray would have disclosed whether or not a callus was being formed, and we shall not now attempt to determine under what circumstances the failure of an attending physician and surgeon to use an X-ray apparatus in cases of fracture should be held to be evidence from which an inference of negligence or unskilful treatment may be drawn. It is clear that under the facts in this case the failure to procure an X-ray during the course of treatment did not amount to negligence or unskilful treatment.

By the Court.—Judgment reversed, and cause remanded to the circuit court with directions to dismiss plaintiff's complaint upon the merits.

JUUL, by guardian *ad litem*, Appellant, vs. SCHOOL DISTRICT OF THE CITY OF MANITOWOC, Respondent.

October 9—November 6, 1918.

Schools and school districts: Governmental duties: Liability for injury to pupil from pail in passage: "Maintaining" building: Cleaning floors.

1. Where, in accordance with a custom, a pail containing hot water and chemicals, to be used in cleaning the floor of a school room, was placed by an employee in a passageway before the pupils had left the school building, such act must be deemed to have been done by the school district in the performance of its governmental duties, and the district is not liable for an injury to a pupil who, while passing from one school room to another, fell into such pail.

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2. The word "maintain" in ch. 588, Laws 1913 (amending secs. 2394—48, 2394—49, Stats.), which requires every owner of a public building to "so construct, repair or maintain" it as to render the same safe, relates to acts more closely related to the structure itself of the building than are the operations (such as the placing of the pail in question) involved in keeping the floors clean.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The appeal is from a judgment dismissing plaintiff's action after a demurrer was sustained to the complaint.

For the appellant there was a brief by *Hougen & Brady* of Manitowoc, attorneys, and *P. H. Martin* of Green Bay, of counsel, and oral argument by *Mr. Martin* and *Mr. A. L. Hougen.*

E. L. Kelley, city attorney, for the respondent.

ESCHWEILER, J. By the complaint herein it is alleged that the infant plaintiff, twelve years of age, was injured by falling into a pail containing hot water, caustic acid, and chemical compounds, in the passageway of one of the school buildings of the defendant where plaintiff was attending as a pupil; that the pail with its contents had been so placed for the purpose of being used to scrub and clean the floor of one of the school rooms in accordance with a custom, maintained for some time prior thereto, of at least once a week so placing such pails with similar contents in the passageways of the school building and before the pupils had left the building; that at the time of the injury plaintiff was passing from one school room to another in the building pursuant to directions given to her by her teacher.

It is a well established principle in this state that a municipality, while performing the duty imposed upon it under the requirements of sec. 3, art. X, of our constitution, which provides for the establishment of district schools which shall be free and without charge for tuition to all children between the ages of four and twenty years, shall not be liable for injuries to children attending such school occur-

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ring by reason of the negligence of servants necessarily employed by such municipality or school district in carrying out what have been designated as the governmental duties so imposed by law upon it. *Bernstein v. Milwaukee,* 158 Wis. 576, 149 N. W. 382; *Folk v. Milwaukee,* 108 Wis. 359, 84 N. W. 420.

The same principle is very generally recognized. *Hill v. Boston,* 122 Mass. 344; 35 Cyc. 971; 19 Ruling Case Law, 1124. Until changed by the legislature we feel bound to follow it.

Appellant cites *Redfield v. School Dist.* 48 Wash. 85, 92 Pac. 770, which sustained a liability against a school district where a pupil was injured by being scalded by a pail of hot water; but there the court placed the liability upon a statute of that state permitting an action against a school district or other public corporation for an injury to the rights of a plaintiff arising from some act or omission of such public corporation, and expressly held that such statute was evidently intended to do away with the general and common-law doctrine of nonliability for that which occurs in the performance of governmental duties.

It is urged that by ch. 588, Laws 1913, amending secs. 2394—48 and 2394—49, Stats., there is in effect a legislative declaration doing away with this doctrine of such nonliability. Before the enactment of that chapter these two statutes were, as they are now, found in ch. 110*a*, Stats., relating to "Workmen's Compensation and Industrial Commission." As they stood before 1913 they in effect provided that every employer should furnish a safe place of employment for his employees. This ch. 588 added a provision in substance placing an obligation upon every owner of a public building, as well as on every employer, that each shall so construct, repair, or maintain such public building or place of employment as to render each of the same safe.

From such legislative change it is claimed that it was intended to now make it a statutory duty of a school district,

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such as the defendant in this case, to construct and repair, and particularly as applied to this case to maintain, its school building so as to render the same safe, and that upon a violation of such a statutory duty and consequent injury to a pupil an implied liability arises against such school district.

Unless, however, the act complained of here, such as the negligent placing within the school building of a pail with dangerous contents to be used in cleaning the floors, can be reasonably construed to be within the meaning of the word "maintain" as found in said chapter, it is unnecessary to consider appellant's contentions any further. We are satisfied from a consideration of this statute, its evident purpose, place, and history, that this word "maintain," particularly when found used with the words "construct or repair," must be held to relate to some act more closely related to the structure itself of a building than such an operation as is here involved of keeping the floors of a building clean.

The conclusion thus arrived at makes it unnecessary to determine any other question with reference to the suggested applicability of such amended statutes to a school building or school district.

It follows, therefore, that the complaint upon its face shows that the act complained of was one done by the defendant school district in the performance of that which must still be recognized as one of its governmental duties towards the pupils, and of such a nature that for a consequent injury to a pupil there is no recognized liability against defendant either at common law or by statute.

By the Court.—The judgment of the circuit court is affirmed.

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NELSON, Appellant, vs. NELSON and another, Respondents.

October 9—November 6, 1918.

Landlord and tenant: Lease: Construction: "Option" for an extension.

1. In a farm lease providing that "at the option" of either party "this lease can be extended for one year and at the end of each years least *(sic)* for a period of five years from the date of this lease," the word "option" was not used in its literal sense, since the exercise of such option by one party in one way would nullify its exercise by the other party in a contrary way; and the provision is construed as giving to either party the right or privilege of continuing the lease as therein provided.
2. Under said provision, at the end of the first year either party could extend the lease for either one or four years, and at the end of the second year either party could extend the lease for a period of three years.
3. Where in such case the lessees held over after the expiration of the first year, their possession must be deemed to have been under the provisions of the lease, and their tenancy was not subject to termination as a tenancy from year to year; and at the end of the second year they were entitled, upon giving proper notice, to extend the lease for three years longer.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

On the 10th day of February, 1915, William Nelson executed a lease to *Christine Nelson* and *Carl T. Oss* by which he leased to them certain lands in Grant county, "to have and to hold the same for the term of one year from date, to be used for agricultural purposes." The lease was in the usual form, and on the margin thereof occurred the following provision:

"It is further agreed and made a part of this contract that at the option of the party of the first part or the party of the second part this lease can be extended for one (1) year and at the end of each years least *(sic)* for a period of five (5) years from the date of this lease."

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The lessees went into possession under the lease. Possession of the premises was not surrendered at the expiration of the year covered by the lease, the lessees simply remaining in possession, farming the premises and paying the rent in the manner provided in the written lease. No notice, either oral or written, was given to the lessor that they elected to exercise the option mentioned in the marginal note above quoted.

On June 16, 1915, the said William Nelson conveyed said premises to *Jessie A. Nelson,* the plaintiff and appellant. On April 25, 1916, the said William Nelson died. On the 29th day of August, 1916, *Jessie A. Nelson,* evidently treating the lessees as tenants from year to year, served upon them a notice terminating such tenancy and demanding a surrender of the premises on the 10th day of February, 1917. A similar notice was also served on the 8th day of January, 1917. On the 10th day of February, 1917, the lessees caused to be served on *Jessie A. Nelson* a notice that they elected to hold the premises for three years more under the option provided for in said marginal provision. On the 21st day of February, 1917, the plaintiff caused to be served upon the defendants a three days' notice to quit.

This is an unlawful detainer action to remove the defendants from the premises. It was commenced before a justice of the peace, appealed to the circuit court for Grant county, where it was tried before the court without a jury, resulting in a judgment in favor of the defendants, from which judgment plaintiff appealed.

W. E. Howe of Boscobel and *J. M. Clancy* of Stoughton, for the appellant.

For the respondents there was a brief by *Blaine & Kemp* of Boscobel, and oral argument by *John J. Blaine.*

OWEN, J. The plaintiff contends that from February 10, 1916, to February 10, 1917, defendants were tenants from year to year, under the statute, resulting from a holding

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over after their term under the lease had expired. The defendants claim that they were holding over under the lease. The character of their possession, as to whether they were tenants holding over under the statute or tenants under the lease, is the principal question to be considered. This involves, first, a construction of the marginal clause appearing on the lease in the following words:

"It is further agreed and made a part of this contract that at the option of the party of the first part or the party of the second part this lease can be extended for one (1) year and at the end of each years least (*sic*) for a period of five (5) years from the date of this lease."

The plaintiff contends that this option is meaningless and void, because it gives the same option to either party, and the exercise of the option by one party automatically destroys the option accorded to the other. The word "option" is defined by lexicographers as the right, power, or liberty of choosing; liberty to elect between alternatives; election, choice, preference. It is apparent that if the word "option" is to be accorded its literal meaning, the exercise of the option by either party either to continue or not to continue the lease for a further period would nullify the exercise of a contrary option on the part of the other. It is obvious that both parties cannot exercise the option unless they both exercise it in the same way. If the lessee desires to continue the lease and the lessor desires to discontinue it, both options cannot be exercised. One must give way to the other. This makes it very apparent that the word "option" in the marginal clause was not used by the parties in its literal sense. That clause, manifestly, was inserted for a purpose. To accord to the term "option," as therein used, its literal meaning would be to construe the acts of the parties in inserting it as purposeless and would be an abandonment of all effort to ascertain and to give effect to the intention of the parties.

It is fundamental that in construing contracts the intention of the parties should be ascertained and enforced. We

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have little doubt that this marginal note was inserted for the purpose of giving to either party the right or privilege of continuing the lease as therein provided. A provision in a lease according to one or both of the parties a right of continuing the same is not at all unusual. This, it seems clear to us, is the thought that the parties to this lease had in mind, and it was to accomplish this purpose that the clause was inserted. We so construe it.

Further analyzing this clause, we interpret it to mean this: At the end of the first year either party could extend the lease for either one year or four years. At the end of the second year either party could extend the lease for a period of three years.

"It is the generally recognized rule that where a lease provides that the tenant may have, at his option, an extension for a specified time after the expiration of the term agreed upon in the lease, or may occupy for an extended term including the term specified, the mere holding over after the expiration of the specified term will constitute an election to hold for the additional or extended term, and the tenant, after holding over beyond the first term without any new arrangement, is bound for the additional or extended term as fully and completely as though that term had been originally included in the lease when executed. The reason for this is that upon the exercise of the privilege for the extended term evidenced by the holding over, the original lease becomes a present demise for the full extended term." 16 Ruling Case Law, 894.

The same rule is laid down by other text-writers. 2 Wood, Landl. & T. p. 947; 2 Tiffany, Landl. & T. p. 1526; 24 Cyc. 1018. It has also been recognized by this court. *Peehl v. Bumbalek*, 99 Wis. 62, 74 N. W. 545.

It follows that defendants were in possession from January 10, 1916, to January 10, 1917, under the provisions of the lease; that their tenancy was not subject to termination in the manner provided by statute as to tenants from year to year; that the lessees properly exercised their option to extend the lease for a period of five years from the date

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thereof; and that the judgment in their favor should be affirmed.

By the Court.—Judgment affirmed.

HUNTLEY, Appellant, vs. STANCHFIELD and another, Respondents.

October 9—November 6, 1918.

Deeds: Covenant restricting use of building: "Hotel" or lodging house? Action, who may maintain.

1. A "hotel" is not necessarily a house in which travelers or guests are furnished with food as well as lodging.
2. The owner of two hotel buildings in a city conveyed one of them to plaintiff, with a covenant that the other should not be used as a hotel for fifteen years from the date of the deed. Afterwards the other building was fitted up and opened for the accommodation of the public and of transient guests, who registered as in a hotel and were charged a fixed rate per day, and an office, a lobby, and a parlor for the common use of guests were maintained therein. Persons who lodged in the building regularly for long periods of time were also accommodated. No meals were served in connection with the business. *Held,* that the building was thereby used, not merely as a lodging house, but as a "hotel" and in violation of the restrictive covenant above mentioned.
3. By the inclusion of such restriction in subsequent successive deeds of said other building it became binding upon the grantees thereof and enforceable against them by the plaintiff, for whose benefit the restrictive covenant was first made.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

This action was brought by the plaintiff to restrain the defendants from operating certain property in the city of Platteville as a hotel.

The plaintiff is the owner of the Columbia Hotel in Platteville, which he, with his brother, Scott Huntley, bought in October, 1916, from Louis N. Patnaude and wife. The Patnaudes were owners of another hotel in Platteville,

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known as the Republican House, which was used by them to lodge guests when the Columbia Hotel was full. Part of the agreement under which the Huntley brothers purchased the Columbia Hotel from Louis N. Patnaude and wife was that the Republican House should not be operated as a hotel for a period of fifteen years. The deed of the Patnaudes to plaintiff and his brother of the Columbia Hotel property contained the following covenant: "that the said building known as the Republican Hotel shall not be used as a hotel for fifteen years from the date of the execution of this deed." *Murray Huntley* is now the sole owner of the Columbia Hotel.

On December 13, 1916, Louis N. Patnaude, then a widower, sold the Republican House property to Carl F. Barreis and wife, the deed containing a covenant that the property should not be used as a hotel for fifteen years. Carl F. Barreis and wife, on May 23, 1917, deeded the Republican Hotel property to *Nina B. Schultz* and *Nellie E. Stanchfield,* which deed contained a covenant that the property should not be used as a hotel for fifteen years from November 14, 1916.

The complaint alleges that the defendants made improvements in the property and proceeded to open the building as a hotel and to operate it as such in violation of the restrictive covenant in the deed by which the property was conveyed to them, and that the operation and use of the Republican House property (now known as the "Stanchfield") has damaged the business of the Columbia Hotel.

The defendants deny that they have operated the Republican House building as a hotel, or that there was any privity of estate between the plaintiff and Louis N. Patnaude as to the property known as the Republican House at the time the deed to the Columbia Hotel was made. They further allege that neither the provision in the contract for the Columbia Hotel nor the condition named in the deed from Louis N. Patnaude to the plaintiff and Scott Huntley con-

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stitutes a covenant running with such land; that the conditions in the contract and deed from Louis N. Patnaude to plaintiff and Scott Huntley are not binding upon defendants.

The trial court found that the defendants had not used the Republican House property as a hotel, but only as a lodging house, and that they had never at any time served meals on the premises, and that there had been no violation of the restrictive covenant in the conveyances.

The judge dismissed the plaintiff's complaint with directions that the defendants recover from the plaintiff their costs and disbursements. Appeal is taken from such judgment.

For the appellant there were briefs by *Grotophorst, Thomas, Rieser & Quale* of Baraboo, and oral argument by *H. H. Thomas.*

For the respondents there was a brief by *Hodson & Hodson* and *M. S. Block,* all of Platteville, and oral argument by *W. T. Hodson.*

SIEBECKER, J. The trial court found that the defendants as owners of the Republican House property repaired the building "and occupied and used it only as a rooming or lodging house; . . . no meals or lunches of any kind were furnished by them to any persons lodging at said building; . . . that in said city of Platteville and in Southern Wisconsin every so-called hotel is of the character of a common-law inn, namely, a house where a traveler is furnished as a regular matter of business with food and lodging;" that defendants let sleeping rooms to such persons as pleased them and were keepers of a rooming or lodging house; and "that said defendants have never since their occupancy of said Republican Hotel building used said building as a hotel, and that their use of said building is not in violation of the restrictive covenant in said conveyances."

Upon these grounds the plaintiff's complaint was dismissed. The plaintiff assails these conclusions of the trial

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court upon the grounds that the undisputed facts show that the business conducted by defendants in the Republican Hotel property constituted a use thereof "as a hotel" and is contrary to the covenants in the plaintiff's and defendants' deeds made pursuant to the agreement of plaintiff and Patnaude, the owner of both properties. This agreement provided that, in consideration of plaintiff's purchase of the Columbia Hotel, the building on defendants' property should not be used as a hotel for fifteen years. The evidence shows without dispute that the Republican Hotel building had been erected and was used as a hotel prior to the time the plaintiff bought and conducted the Columbia Hotel; that plaintiff and Patnaude were agreed that the hotel business of Platteville was not sufficient to financially sustain the operation of both properties as hotels; that the plaintiff, in consideration that no hotel business would be conducted in defendants' building for fifteen years, purchased and operated the Columbia Hotel. The defendants acquired the Republican Hotel property in May, 1917. They fitted out twenty-four of the thirty-two guest rooms for the accommodation of their patrons and guests and conducted the business under the name and style of "The Stanchfield." They conducted this business in the following manner: (1) having a fixed rate of charges per day; (2) having the guests register as is done in the hotel business; (3) maintaining an office and a lobby; (4) maintaining a parlor for the common use of guests; (5) keeping the building open to the public generally; (6) accommodating transient guests. It appears also that the defendants accommodated persons who lodged in the building regularly for long periods of time; that they let a suite of rooms on the third floor to a family to occupy and do housekeeping therein, and that both of the defendants' families lived in the building as their home, and that no meals were served to guests or strangers in connection with this business.

The question arises: Is this use of the building in viola-

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tion of the covenants in the deeds forbidding that it be used "as a hotel?" The trial court declared: "That in said city of Platteville and in Southern Wisconsin every so-called hotel is of the character of a common-law inn, namely, a house where a traveler is furnished as a regular matter of business with food and lodging." This view of the law is out of harmony with the fashion of the age in the extensive practice of conducting hotels on the so-called European plan, under which accommodation and entertainment are provided for the public exclusive of meals. It is well known that the practice of not furnishing meals to guests of hotels and inns has become well nigh universal in this country, and that this practice in the conduct of such business has not in law taken such establishments out of the category of hotels and inns and put them into the class of lodging houses. The latter are distinguished from the former in that the keeper specially deals with his customers by contracting personally with the customer for the nature of the accommodation to be provided, the duration of the stay, and exercises the right to reject all applicants at his pleasure. These conclusions find support in the following adjudications: *Metzler v. Terminal H. Co.* 135 Mo. App. 410, 115 S. W. 1037; *Nelson v. Johnson,* 104 Minn. 440, 116 N. W. 828; *Fay v. Pacific I. Co.* 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943; *Kieffer v. Keough* (Tex. Civ. App.) 188 S. W. 44.

The legislation of the state embodying regulation of hotels and inns indicates that this modern hotel business is classed with that of innkeepers. The facts and circumstances of the making of the contract for the conveyance of the Columbia Hotel property by Patnaude and wife to plaintiff and his brother clearly show that the restrictive covenant in the deed was intended to forbid such uses of the defendants' property as are commonly included in the generally accepted meaning of the term "hotel."

It follows that the trial court erred in holding that "every so-called hotel is of the character of a common-law inn,

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namely, a house where a traveler is furnished as a regular matter of business with food and lodging." Nor is the court's conclusion that the defendants, "during all of the time they have been in the occupancy of said building, let sleeping rooms to only such persons as pleased them and were merely . . . keepers of a rooming or lodging house," sustained by the facts of the case. As heretofore shown, the character of defendants' business and the manner in which they conducted it show they were offering their accommodation to the public as hotels do and that it constitutes a hotel business in the modern legal sense. It is obvious that this class of business was contemplated by the restrictive covenant in the deeds. The restriction was effectual against Patnaude as owner of the Republican Hotel property and became binding on the subsequent owners by express covenants in the successive deeds, and hence inures to the benefit of the plaintiff as the original party thereto.

If the defendants had restricted their business in this building to that which is recognized in the law as a private boarding- or lodging-house business, it would not have offended against the restrictive covenants as intended by the parties. This field they, however, as above indicated, have transgressed by entering upon the conduct of a "hotel business." It follows that the plaintiff is entitled to judgment restraining defendants from conducting a hotel business in the building referred to as the Republican House, and that the court erred in dismissing the complaint.

By the Court.—The judgment appealed from is reversed, and the cause remanded with direction to award judgment in plaintiff's favor as indicated in the opinion.

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HURLBUT, Appellant, vs. UNION TELEPHONE COMPANY OF PRAIRIE DU CHIEN, Respondent.

October 9—November 6, 1918.

Telephone companies: Trimming of trees without owner's consent: Damages.

1. **The owner of land in a street or of land abutting the street is entitled to compensation for injuries to his shade trees in the street occasioned by their being trimmed without his consent by a telephone company; and no license from the city to maintain the telephone system can give the right to do such trimming.**
2. **Under sub. 6, sec. 1778, Stats., if there have been no condemnation proceedings, a telephone company which destroys, trims, or otherwise injures shade trees along its line without the owner's consent is liable to the owner for treble damages.**

APPEAL from a judgment of the circuit court for Crawford county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to recover damages for injuries to plaintiff's shade trees growing in a parkway between the sidewalk and the curb of the street in front of plaintiff's premises in Prairie du Chien, occasioned by their being trimmed by the defendant so as not to interfere with its wires. It appears that defendant had a license from the city of Prairie du Chien to build and maintain its telephone lines in the streets of the city, but it does not appear that any condemnation of plaintiff's land was ever had. Defendant justified under its statutory and city license only. It claimed no right by reason of condemnation, purchase, or permission from plaintiff to subject his premises to the additional burden of its telephone line. The jury found (1) the telephone line was not established at the place in question under license from the city at the time the trees were planted; (2) the trees grew to a height to interfere with the telephone wires and telephone service; (3) it was necessary, in order that the telephone might efficiently work, that the trees should be trimmed; (4) the trimming was no more than necessary

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to keep the wires in working order; and (5) it caused plaintiff damages in the sum of $35. Plaintiff moved for judgment in the sum of $105, treble damages under the statute. The defendant, among other motions, moved for judgment upon the special verdict in its favor, which motion was granted. From a judgment entered accordingly dismissing the action plaintiff appealed.

Alexander Athey of Prairie du Chien, for the appellant.

For the respondent there was a brief by *Munson & Curran* of Prairie du Chien, and oral argument by *M. R. Munson.*

VINJE, J. It does not appear from the record upon what ground the trial court denied plaintiff relief, but presumably it was upon the ground that the defendant's license from the city authorized it to trim the trees sufficiently to enable it to give efficient service. If that was the basis of the court's ruling it erred, because a license from a city to maintain a telephone system upon its streets gives the holder thereof no right to enter upon land within the street and commit acts injurious thereto without the consent of the owner of such land. The maintenance of a telephone line is an additional servitude to the public easement in a highway. *Krueger v. Wis. Tel. Co.* 106 Wis. 96, 81 N. W. 1041; 24 L. R. A. 721, note, and cases cited. And cities cannot empower either persons or corporations to take private property or increase a servitude without due compensation. Courts generally sustain the doctrine that the owner of land in a street or of land abutting the street is entitled to compensation for injuries to his shade trees in the street occasioned by their being trimmed without his consent by a telephone company. *Norman M. & G. Co. v. Bethurem,* 41 Okla. 735, 139 Pac. 830, 51 L. R. A. N. S. 1082 and note; *Slabaugh v. Omaha E. L. & P. Co.* 87 Neb. 805, 128 N. W. 505, 30 L. R. A. N. S. 1084; *Cartwright v. Liberty Tel. Co.* 205 Mo. 126, 103 S. W. 982, 12 L. R. A. N. S.

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1125; *Brown v. Asheville E. Co.* 138 N. C. 534, 51 S. E. 62, 69 L. R. A. 631 and note; *St. Paul R. & A. Co. v. Tri-State T. & T. Co.* 122 Minn. 424, 142 N. W. 807.

This court is in accord with the doctrine announced in the cases above cited. For authorities holding the contrary view see notes to L. R. A. cases above referred to. But we need not place our decision on the common-law liability of telephone companies to respond in damages for injuries to shade trees occasioned by unpermitted trimming. Our legislature has expressly given the remedy and fixed the amount of damages recoverable. Sub. 6, sec. 1778, Stats., reads:

"Nothing contained in this section shall authorize or empower such . . . telephone . . . company or corporation, to in any manner destroy, trim or otherwise injure any shade or ornamental trees along any such lines or systems . . . except by the consent of the owner, and any person or corporation violating any of the provisions of this section shall be liable to the person aggrieved in three times the actual damage sustained besides costs."

Under the provision of this section it became the duty of the trial court to grant plaintiff's motion for judgment for treble damages.

Whether a telephone company must respond in damages for unpermitted trimming of shade trees in a case where condemnation proceedings have been had we do not decide.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for plaintiff for $105 and costs.

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DUNN, Appellant, vs. ACME AUTO & GARAGE COMPANY and others, Respondents.

October 9—November 6, 1918.

Appealable orders: Injunction: Preserving status quo: Judicial discretion: Corporations: Accounting: Sale of treasury stock: Right of stockholder to acquire his proportionate share: Waiver: Duty of directors: Corporate books: Examination.

1. An order of the circuit court continuing, but modifying, a temporary restraining order made by a court commissioner, is appealable under sec. 3069, Stats.
2. Where, upon an application for an order preserving the *status quo* pending the final result of an action, the papers show a reasonable probability of plaintiff's ultimate success, it is well nigh an imperative duty of the court to grant such relief, even though there is a direct conflict between the complaint and its supporting affidavits and the answer and affidavits on defendant's behalf.
3. In an action by a stockholder against a corporation for an accounting, the refusal to grant a temporary injunction preserving the *status quo* by restraining the sale of certain treasury stock was not justified by a claim, unsupported by the facts, that such sale was necessary to, and would, enable the company to become legally incorporated; nor was such refusal justified by the claim that the sale was necessary because of the indebtedness of the company, the amount for which the stock was in fact sold being so small as compared with the indebtedness that it could not affect materially the company's financial standing.
4. Where a corporation has purchased, retired, canceled, and placed in its treasury shares of its own stock it has thereby decreased its outstanding capital stock; and such shares cannot thereafter be sold and reissued without first giving to all the existing stockholders an opportunity to take their proportionate shares thereof.
5. If shares of its own stock purchased by a corporation have been treated as still outstanding, being carried upon its books as a liability, and have also been treated as an asset of the corporation, a different question is presented; but in any event the directors can dispose of such shares only in the honest exercise of their discretion, acting with the utmost good faith for the benefit of all stockholders, and not so as to give one faction or group of stockholders a benefit or advantage over another.

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6. The right of a stockholder to acquire his proportionate share of a reissue of stock which had been purchased and retired by the corporation is not a mere privilege which is waived by his failure to offer to purchase the stock or attempt to bid therefor when it is offered for sale to the highest bidder; and especially is this so where the books of the corporation are so incomplete and fragmentary that the real value of the stock cannot be ascertained.

7. It is the duty of the directors to protect a stockholder in his right to acquire a proportionate share of an increase in the capital stock of the corporation, and to offer him such share at a fixed price. Ordinarily the existing stockholders cannot be compelled to pay a bonus.

8. The statutory right of the stockholder to examine the corporate books imposes upon the corporation not only the duty of keeping such books open for inspection at all reasonable times, but also the duty of keeping its stock subscriptions and accounts in such form that they may be examined and the condition of the corporate affairs ascertained therefrom.

9. Under the circumstances disclosed in this action for a corporate accounting the *status quo* with respect to certain treasury stock should have been preserved, and an order authorizing the directors to sell such stock without recognizing or protecting plaintiff's right to preserve his proportionate interest in the corporation is *held* an abuse of judicial power.

APPEAL from orders of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Equitable action for an accounting and other relief.

The plaintiff and the persons named as defendants were all of the stockholders of the defendant company, each of the stockholders being the owner of fifty shares of the capital stock of the par value of $10 a share. The plaintiff at one time was an officer and director of the company, but some time previous to the commencement of this action had ceased to be such, and differences had arisen between plaintiff and the defendant stockholders. The summons in this action was served December 16, 1916. On January 11 and 12, 1917, the defendants *Kettler, Hill,* and *Goodell* were examined adversely. It appears that prior to the commencement of the action the plaintiff had made some attempt to examine the books of the company, but had found the same

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so incomplete and fragmentary that an accountant hired found it impossible to ascertain with any definiteness the amount of business done by the company or its assets and liabilities. In January, 1918, the defendant stockholders, who constituted the board of directors, declared an eighty per cent. dividend upon the capital stock of the company. The capital stock of the company was $10,000, divided into 1,000 shares of $10 each. Of this 462½ shares had been issued, but some time between the organization of the company in 1911 and the commencement of this action 162½ shares had been repurchased by the corporation from its then owners. In the month of January, 1918, the defendant stockholders, acting as a board of directors of the defendant company, determined to sell 162½ shares of the capital stock of the company then in its treasury. Thereupon the plaintiff, on March 18, 1918, prepared and served his verified complaint, and upon the verified complaint, supporting affidavits, and the matter elicited by the adverse examination of the defendants *Kettler, Hill,* and *Goodell* obtained an order requiring the defendants to show cause why a temporary injunction should not be granted restraining the defendants from selling any of the capital stock of said corporation then in its treasury until a hearing on the motion and further order of the court, the order to show cause and a restraining order being signed by a court commissioner on March 18, 1918. The defendants then procured an order returnable on April 5th, requiring the plaintiff to show cause why the temporary injunction should not be modified and why the sale of the 162½ shares should not be authorized, and on the hearing thereof on April 5th it was ordered (the two motions being heard together) that plaintiff's motion for a temporary injunction as to the 162½ shares be denied, and that the defendants be authorized, subject to confirmation by the court, to make sale at public auction of the 162½ shares, sometimes described as 6½ shares, and modifying the restraining order issued by the court commissioner. Said order further reserved the ques-

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tion of whether further sales of treasury stock should be made until the hearing on a motion to confirm the sale of the 162½ shares. On June 24, 1918, on motion made to confirm the sale of the 162½ shares to Adam Miller at $11.25 per share, an order was entered confirming the sale and directing the defendant company to issue and deliver the stock so sold to said Adam Miller. From the order denying plaintiff's motion for a temporary restraining order and authorizing the sale of the 162½ shares and from the order confirming the sale plaintiff appeals.

For the appellant there were briefs by *Brennan & Carthew* of Lancaster, attorneys, and *H. L. Butler* of Madison, of counsel, and oral argument by *Mr. Butler* and *Mr. B. H. Stebbins* of Madison.

For the respondents there was a brief by *R. A. Goodell* of Lancaster and *Kopp & Bruncknorst* of Platteville, and the cause was argued orally by *Mr. L. A. Bruncknorst* and *Mr. Goodell.*

ROSENBERRY, J. The first claim made is that the appeal should be dismissed for the reason that the order of April 5, 1918, is not appealable under sec. 3069, Stats., citing *Nash v. Meggett,* 89 Wis. 486, 61 N. W. 283.

The order of April 5, 1918, expressly continues the injunctional order issued by the court commissioner except as modified by the direction for sale subject to confirmation by the court. It seems clear that the order of March 18th was modified by the order of April 5th and is therefore within the provisions of sec. 3069, Stats., and appealable, it being an order which modifies an injunction. *Brock v. Dole,* 66 Wis. 142, 28 N. W. 334. It is further claimed that an order granting or refusing an injunction is one within the sound discretion of the court and that the action of the trial court in that respect will not be reversed unless so clearly wrong as to evince an abuse of judicial power. *Gowran v. Lennon,* 154 Wis. 566, 143 N. W. 678; *Tiede v. Schneidt,* 99 Wis. 201, 74 N. W. 798.

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It is further claimed that upon this appeal this court is bound by the findings made by the trial court, citing *Conger v. Dingman,* 98 Wis. 417, 74 N. W. 125. The case cited is not authority for the proposition made. We think the rule is correctly stated in *Ekern v. McGovern,* 154 Wis. 157, 202, 142 N. W. 595, as follows:

"Where the papers on an application for an order preserving the *status quo* pending the final result of the case show a reasonable probability of plaintiff's ultimate success, it is well nigh an imperative duty of the court to grant such relief."

This is true notwithstanding there is a direct conflict between the complaint and the supporting affidavits and the answer and the affidavits on the part of the defendants. *Valley I. W. M. Co. v. Goodrick,* 103 Wis. 436, 445, 78 N. W. 1096.

The complaint alleges with great particularity that plaintiff has been deprived of all voice in the management of the affairs of the company; that the defendants as directors and officers have failed to perform their duties and honestly and fairly to administer the affairs of the corporation; that the assets of the corporation have been wrongfully diverted by the defendants to their own profit; that no proper books of account are kept; and that the business is mismanaged in many particulars therein stated. The verified complaint, although many of its allegations are upon information and belief, was supported by the adverse examination of three of the defendants and by the affidavits of disinterested persons as to some of the allegations. A strong *prima facie* showing was made. The allegations of the complaint were directly denied by answer and there are supporting affidavits on defendants' behalf. A showing was made which clearly entitled the plaintiff to a restraining order preserving the *status quo* until a trial and determination could be had unless some facts should clearly appear which made a change in the *status quo* necessary in order to preserve the

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rights of all the parties and ultimately to do justice between them. The defendants attempted to meet this situation by the claim that the sale of the stock was necessary in order to allow the company to comply with the statutes so as to enable it to become legally incorporated, there being prior to the sale only thirty per cent. of the capital stock issued and outstanding. It is a complete answer to this claim to say that it does not appear that fifty per cent. of the capital stock is not subscribed and it does appear that twenty per cent. of the capital stock is subscribed and paid for, and further, that if a sale of enough capital stock is made so that the total amount issued and outstanding shall be fifty per cent., the sale of the 162½ shares is not sufficient to accomplish that purpose.

It is further claimed that the indebtedness of the company, which at the time of the sale amounted to about $11,000, it being $13,800 when the sale was authorized, required a sale of the company's stock. The stock sold brought to the treasury of the company $1,828.12. Five thousand dollars of the indebtedness owing was to the defendant stockholders. The application of the $1,828.12 certainly would not have much if any effect upon the financial standing of the company.

While a sale of treasury stock under some circumstances may be proper, there remains one consideration which seems to us controlling in the situation presented by this record, and that is that the court directed a disposal of the stock by a method which denied to the plaintiff his plain legal right to maintain his proportionate interest in the assets of the corporation.

It clearly appears from the complaint and supporting affidavits that it will be practically impossible to determine even approximately the value of the stock of this company until the matters set out in the complaint are fully litigated and the amount determined, if any, which the defendants shall be required to repay into the treasury of the company

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on account of unlawful diversion of moneys and property belonging to the company.

In *Luther v. C. J. Luther Co.* 118 Wis. 112, 122, 94 N. W. 69, it was distinctly held that, "in an already established and going corporation, an increase of capital stock, accomplished either by formal increase of the amount originally authorized or by issue of what had originally been withheld, though within the authorized amount, without first giving opportunity to all existing stockholders to take their proportionate shares of such increase, is wholly beyond the power, not only of the directors, but of any mere majority of stockholders."

The question as to whether or not the rule should be applied in case of stock once issued but purchased and retired by the corporation itself was expressly reserved. While in the *Luther Case* a question of corporate control and management was involved, that is not the only consideration upon which the rule is founded. In the *Luther Case* it was said:

"While the ultimate purpose of most stock corporations is money profit, the right of proportionate voice and influence in selection of policy and method of accomplishing that result is most important to each shareholder. It is as fundamental and vital as the right of suffrage under a representative government. . . . Each holder of a share of stock has the right that, by convincing the holders of a certain number of other shares, his policy of business be followed. Any invasion of that right is an injury to him which, from his point of view, may be greater than very considerable present money loss to the corporation. While this right must yield to a power over it given by the terms of the association, still he has the right to insist that such power shall be exercised for the purposes of the whole association. It is not so when exercised for the direct purpose of depriving him of his proportionate voice and influence." Pages 123, 124.

The stockholder is given a right to his proportionate voice in the control of the company to protect his financial in-

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terest. Upon what grounds, then, can it be said that his financial interest should not be protected?

As was said in the *Luther Case,* the limitations upon the powers of directors in our corporations with reference to stock which has once issued and has been repurchased for the corporation must be considered with reference to sec. 1776, Stats., which provides: "The stock, property, affairs and business of every such stock corporation shall be under the care of and be managed by a board of directors," etc.

The Minnesota court in *Jones v. Morrison,* 31 Minn. 140, 16 N. W. 854, held under a similar statute that the rule did apply to stock once issued and repurchased by the corporation. It is to be noted that capital stock authorized but never issued and increase of capital stock are embraced within the term "stock" as well as stock which has been issued but repurchased by the corporation for its own account. If the rule applies in any case it should apply in all cases where the reason for the rule exists.

In this connection it is to be noted that in Wisconsin a corporation has power to purchase the shares of its own capital stock when such purchase is made for a legitimate and honest purpose and the rights of creditors do not suffer thereby. *Gilchrist v. Highfield,* 140 Wis. 476, 123 N. W. 102. Wisconsin corporations also have power to decrease their outstanding capital stock. Secs. 1774 and 1755, Stats.

What is the effect, then, of a lawful purchase of its own capital stock by a corporation? If retired, canceled, and placed in the treasury of the company and not reissued, manifestly its effect is to decrease the outstanding capital stock. When the capital stock of the corporation has been decreased and it is proposed to reissue the repurchased stock, every reason for making such reissue proportionate to the holdings of the then stockholders exists that would exist if such increase were of stock not theretofore issued or an increase in the authorized capital. The books of the defendant corporation were so imperfectly kept that it is very difficult

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if not impossible to tell how the repurchase in this case was treated. Two of the defendant stockholders testified that the stock which was purchased had been placed in the treasury of the company. It appears from the affidavits that some of the stock was repurchased as much as two years prior to the making of the attempted sale under the order of the court. The defendant company has not made the statement required by sec. 1750, Stats. It seems fairly clear that the corporation did not treat the stock repurchased as a liability; in fact it did not appear on either side of its books. Under such circumstances, the corporation having lawfully purchased and then retired its own shares, and having statutory power to diminish its capital stock, it must be held that its outstanding capital stock is thereby diminished; particularly so in this case, as it appears that the purchase was made by the defendant directors for the purpose of quieting criticism as to the management of the company and the conduct of its affairs. It further appears that the company continued after the retirement of the stock to do a profitable business, and under such circumstances the rule that the directors of a corporation cannot authorize a sale or an increase of capital stock either by formally increasing the amount originally authorized or by issuing that which had originally been withheld, without first giving to all its existing stockholders an opportunity to take their proportionate share of such increase, applies to such proposed reissue, and the attempt of the directors to reissue such stock without first offering it to the then stockholders of the company was unlawful, and such sale should not have been authorized.

A different question would have been presented if the shares of its own stock purchased by the corporation had been carried upon its books as a liability and they had been treated as an asset of the corporation; but in any event the action of the directors would be subject to the rule that the directors could dispose of the same only in the honest exercise of their discretion, and that in such disposition they

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were bound to act with the utmost good faith for the benefit of all stockholders and that it should not be disposed of so as to give one faction or group of stockholders a benefit or advantage over another. *Luther v. C. J. Luther Co.* 118 Wis. 112, 94 N. W. 69.

It is claimed that because the plaintiff did not offer to purchase the stock or attempt to bid thereon he has waived his right to his proportionate share of the reissue. His claim to a proportionate share of the reissue is not a privilege but a right, and it is the duty of the directors to protect him in the enjoyment of that right and to offer him his proportionate share of the increase at a fixed price. In this case there appears to be no reason why it should be offered to present stockholders at a price above par. The authorized capital of the company is $10,000, of which only $3,000 is outstanding. Ordinarily the stockholders cannot be compelled to pay a bonus. *Hammond v. Edison I. Co.* 131 Mich. 79, 90 N. W. 1040; *Electric Co. v. Edison E. I. Co.* 200 Pa. St. 516, 50 Atl. 164. Assuming the allegations of the complaint to be true, it appears therefrom that neither the plaintiff nor any one else could ascertain the value of the stock, and to say that offering the stock for sale to the highest bidder protects him in the enjoyment of his right to acquire his proportionate share of the proposed reissue is practically a contradiction in terms. In order to protect himself he would be obliged to guess at a fair price, with as much, if not more, chance of guessing wrong as of guessing right. It has been held to the contrary in other jurisdictions. *Crosby v. Stratton,* 17 Colo. App. 212, 68 Pac. 130; *State ex rel. Page v. Smith,* 48 Vt. 266. In *State ex rel. Page v. Smith,* which is the leading case, the corporation had no power to decrease its capital stock, and treated the repurchased stock as outstanding and carried it on the books as an asset of the company, facts which clearly distinguish that case from this. In *Crosby v. Stratton* the question of whether the outstanding capital stock was diminished by the

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transfer to the company was not considered, and it appears in that case that the stock was transferred to the company for resale as a part of its general assets.

The record does not disclose any urgent necessity for the immediate sale of the stock of the defendant company. If the allegations of the complaint are true, it would be to the manifest disadvantage of the plaintiff, a minority stockholder, to be compelled to choose between losing his proportionate interest in the present assets of the company or subjecting further moneys to the management and control of a hostile and incompetent directorate. It appears from the record that it is practically impossible to ascertain from the books and memoranda of the company even approximately its present financial status. Those who claim the right and authority to manage and control the money and property of others ought to show themselves competent to keep an honest and fairly accurate account of their transactions. Minority stockholders have not many rights and the few they have should be safeguarded and vindicated. The statutory right of the stockholder to examine the books of the corporation imposes upon the corporation not only the duty of keeping such books open for inspection at all reasonable times, but also the duty of keeping its stock subscriptions and accounts in such form that they may be examined and the condition of the corporate affairs ascertained therefrom; otherwise the right of inspection is a barren legal right and of no value. *State ex rel. Quinn v. Thompson's M. F. Co.* 160 Wis. 671, 152 N. W. 458.

If the sale of the company's stock had been authorized so as to give to the plaintiff an opportunity of preserving his proportionate interest in the company, there might well be some doubt as to whether or not it would constitute an abuse of discretion, but we have no hesitancy in saying, under the circumstances disclosed in this case, that it is clearly the better administration to preserve the *status quo* until the allegations in the complaint can be inquired into and a de-

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termination had with reference thereto; and in view of the fact that the order does not recognize or protect plaintiff's right to preserve his proportionate interest in the corporation, we must hold its issuance an abuse of judicial power.

In justice to the trial judge it should be said that it is claimed here that the question of the right of plaintiff to have his proportionate interest in the assets of the corporation preserved was not urged upon the attention of the court below. The question, however, is squarely presented by the record, fully argued here, and the interests of justice and a proper administration of the law require that it be now considered.

By the Court.—The order confirming the sale is reversed; so much of the order of April 5th as is appealed from is reversed, with directions that an order be entered setting aside the sale and continuing in force the temporary injunction preserving the *status quo;* and the cause is remanded for further proceedings according to law.

DRING, Appellant, vs. MAINWARING and others, Respondents.

October 9—November 6, 1918.

Courts: Lack of jurisdiction: Transfer of action to another court: Jurisdiction of parties: Intervening defendant: Costs: Appeal: Immaterial error.

1. Under sec. 2836*b*, Stats., although the court in which this action was brought had no jurisdiction thereof, it acquired jurisdiction of the original parties, and also had power to permit another defendant to intervene and acquired jurisdiction of his person, where such intervention took place before the question as to jurisdiction of the action was raised or the issues had been made up so that that question could be determined.
2. Where an action brought in a county court which had no jurisdiction thereof was certified, under sec. 2836*a*, Stats., to the circuit court having jurisdiction, the question of costs remained open, to abide the final decision in the action; and

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where that decision was in plaintiff's favor the circuit court had jurisdiction to, and might properly, tax against the defendants plaintiff's costs and disbursements necessarily incurred in the county court which were identical with those which would have been incurred had the action been originally brought in the circuit court. This would not include costs growing out of a trial in the county court, that proceeding being a mere nullity and such costs not being necessarily incurred.

3. Although a judgment of the circuit court in such a case, in which costs were not taxed against a defendant because the court held that it had no jurisdiction to tax them, was erroneous, it is not reversed on appeal, the amount of the costs which might have been taxed being inconsequential.
4. A defendant who, in such a case, had been lawfully permitted by the county court to intervene in the action, could not, after the transfer of the action to the circuit court, withdraw from the case without the permission of the latter court and thereby escape liability for costs.
5. A defendant who has intervened in an action is not chargeable with costs which accrued prior to the time of his intervention.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This action was brought in the county court of Iowa county to restrain a town board from laying out a highway. The defendant *David Walker* intervened and answered the complaint. The town board did not answer, and *Walker* was the only contesting defendant. The cause went to trial in the county court of Iowa county on the issue raised by *Walker's* answer, resulting in a judgment in favor of the plaintiff. The court, however, declined to grant costs against the defendant *Walker*, and the plaintiff appealed from that part of the judgment to this court. The decision of this court will be found in 165 Wis. at page 356 (162 N. W. 169). It was there held that the county court of Iowa county had no jurisdiction of the case, and it was remanded with directions to the county court to certify it to some court that did have jurisdiction. It was accordingly certified to the circuit court for Iowa county. The defendant *Walker* moved

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in the circuit court for Iowa county for permission to withdraw from the case. The court refused to grant him permission to withdraw from the case, but did permit him to withdraw his answer, after which there was no issue left. The plaintiff submitted proof to support his complaint in the circuit court for Iowa county, and judgment was again rendered in favor of the plaintiff, with costs against the defendant *Walker*.

The plaintiff served a bill of costs, which included all costs incurred in any manner in the county court of Iowa county, and which was allowed by the clerk. Upon motion to review such taxation of costs the circuit court held that it was without jurisdiction to tax any costs against *Walker* which were incurred in the county court, and allowed the taxation only of such costs as were incurred in the circuit court. Plaintiff brings this appeal from that part of the judgment of the circuit court which denies to him any costs accruing prior to the certification of the case to the circuit court.

For the appellant there was a brief by *J. P. Smelker* of Dodgeville, and the cause was argued orally by *C. H. Crownhart* of Madison.

For the respondent *Walker* there was a brief by *James E. O'Neill* of Dodgeville, attorney, and *E. E. Brossard* of Madison, of counsel, and oral argument by *Mr. Brossard*.

OWEN, J. The question presented is whether the circuit court for Iowa county could lawfully impose upon the defendant *Walker* costs which were incurred in the county court. The circuit court held that it was without jurisdiction to do so. Ordinarily this would be true, and the only question to be considered is whether the provisions of sec. 2836*a* and sec. 2836*b*, Stats., change the situation. Those sections were enacted by the legislature in the furtherance of justice and to prevent the dismissal of actions where a plaintiff commenced his action in a court having no juris-

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diction thereof or where he mistook his remedy. In brief, sec. 2836*a* provides that where the jurisdiction of a court over a pending action is challenged and such challenge sustained, the action shall not be dismissed but shall be certified to some court having jurisdiction thereof; and sec. 2836*b* provides that where a party has mistaken his remedy his action shall not be finally dismissed, but costs shall be awarded against him and he shall be allowed a reasonable time within which to amend, and the amended action or proceeding shall continue in that court except in case that court has no jurisdiction to grant the relief sought, in which case the action in whole or in such divisible part in which jurisdiction is lacking shall be certified to some other court which has jurisdiction. It also authorizes amendments changing any action from one on contract to one in tort and *vice versa,* from one at law to one in equity and *vice versa,* from a special proceeding to an action and *vice versa,* from any writ to any other writ, from any proceeding or action under or pursuant to any writ to any action and *vice versa.* The judgment in all cases of mistaken remedy shall be *respondeat ouster* and for costs, the latter in the discretion of the court, but with leave to amend and proceed in that court or some other designated court; or part in that court and part in some other court in one or several actions or proceedings, as justice may require.

From the provisions of sec. 2836*b* it is clearly conceivable that an action brought in a given court of which it has no jurisdiction may be converted into one of which it has jurisdiction, or, if an action be brought of which it has jurisdiction, it may be converted into one of which it has no jurisdiction. It seems to us that it must follow that a court may acquire jurisdiction of the parties even though it has no jurisdiction of the case as originally presented by the pleadings, and while the county court of Iowa county had no jurisdiction of the case as eventually formed by the pleadings it did have jurisdiction of the parties. This certainly

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was true as to the original parties defendant. There may be some question as to whether the county court had jurisdiction to permit the defendant *Walker* to interplead. At the time he made application, however, for permission to interplead no question as to the jurisdiction of the court had been raised and the lack of jurisdiction of the court had not been sustained. Neither had the issues been made up so that the character of the case, to enable a determination upon the question of whether the court had jurisdiction thereof, had been disclosed. In other words, the case was in its formative stages, and, even though the court had no jurisdiction of the action as disclosed by the complaint, issues might subsequently have been made up between the parties of which the court would have had jurisdiction. We therefore conclude that the county court did acquire personal jurisdiction of the defendant *Walker;* that it had authority to grant his petition for intervention; and that when he filed his answer to the complaint he was as much a party to the action as the original defendants.

It is to be noted that in cases of mistaken remedy costs are to be awarded against the plaintiff and he is to be allowed a reasonable time in which to amend. Sec. 2836*b*. Cases of mistaken jurisdiction, however, fall within the provisions of sec. 2836*a*. So far as applicable to this case that section simply provides that in all cases in every court where objection to the jurisdiction of that court is sustained by order, judgment, or in any other way, the cause shall be certified to some court having jurisdiction, provided it appear that the error arose from a *bona fide* mistake and not from design. It is under that clause that this case was certified from the county court to the circuit court for Iowa county. There is no provision in that section requiring the payment of costs as a condition precedent to such certification. The question of costs is to remain open and to abide the final decision in the action. It seems to us that the costs incurred in the county court up to this point are as properly

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allowable against the defendants as though the action had been originally brought in the circuit court. The state tax had been paid; the summons and complaint had been served, and all proceedings leading up to the joinder of issue had been taken. To be sure, they were taken in a court without jurisdiction, and without the saving force of the statutory provisions referred to would require a dismissal of the action. But these statutory provisions provide for a transfer of the case from one court to the other, saving the plaintiff from the consequences that would follow but for such provisions. The costs incurred in the county court were identical with those which would have been incurred had the case been brought in the circuit court instead of in the county court. Under the circumstances it seems clear to us that necessary costs and disbursements incurred in the proceeding up to the point of joinder of issue should be regarded as necessary costs and disbursements and as properly allowable in the taxation of a bill of costs as though the case had been originally brought in the proper court. We therefore hold that the circuit court was in error when it decided that it had no jurisdiction to tax any costs against the defendant *Walker* which were incurred in the county court.

We do not feel, however, that the judgment should be reversed. An examination of the proposed bill of costs reveals but few very inconsequential items of costs accruing in the county court that could have been taxed against *Walker*. A defendant who intervenes is not chargeable with costs which accrue prior to the time of his intervention. *Williams v. Washington,* 43 S. C. 355, 21 S. E. 259; *Whitten v. Dabney,* 171 Cal. 621, 154 Pac. 312; *Railsback v. Patton,* 34 Neb. 490, 52 N. W. 277. It will therefore be seen that *Walker* could not be charged with the state tax, the sheriff's fees for service of the summons, nor for the draft and copies of the complaint. The only costs with which he could be chargeable would be, probably, for the copy of the complaint, which presumably was served upon

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him, and for such clerk's fees as resulted from the filing of his answer, petition for intervention, etc. It should be stated that in no event can costs growing out of the trial of the case in county court be taxed against any of the defendants. That proceeding was entirely without jurisdiction and was a mere nullity. They were not costs necessarily incurred. Nothing but costs necessarily incurred in the county court, the counterpart of which would have been incurred in the circuit court had the case been originally brought there, can be taxed or allowed. The items which might have been taxed against the defendant *Walker* are too inconsequential to justify a reversal of the order of the circuit court under sec. 3072*m*, Stats. The maxim *De minimis non curat lex* also justifies the same conclusion. This disposes of the questions raised upon the plaintiff's appeal.

While the respondent *Walker* did not appeal from the judgment rendered against him, he did give notice, pursuant to sec. 3049*a*, Stats., that he would ask for a reversal of that part of the judgment which awards costs against him. His contention is that when the case was transferred to the circuit court he withdrew therefrom, and that as no costs may be taxed against him prior to his intervention neither should they be taxed against him after his withdrawal from the case. It should be borne in mind that when the case reached the circuit court *Walker* asked permission to withdraw from the case. He was denied permission to withdraw from the case, but was permitted to withdraw his answer. He contends that he never became a party to the suit because he never had "leave," of any court with jurisdiction in the premises, to intervene. We have, however, decided that the county court of Iowa county did have authority to permit him to intervene. This effectually disposes of his contention. Having been permitted to intervene by order of the court, and having filed his answer, he could no more withdraw from the case without the permission of the court, and upon such conditions as the court might impose, than

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the original defendants. The court had power to award costs against him, and the judgment in that respect cannot be reversed.

By the Court.—Judgment affirmed.

STIMPSON and others, Respondents, vs. STIMPSON and another, Appellants.

October 9—November 6, 1918.

Cancellation of instruments: Discretion: Mistake: Wills: Contract for different disposition of estate: Validity: Public policy.

1. An application for cancellation of a contract is addressed to the sound discretion of a court of equity; and substantial mistake on the part of the party applying may be sufficient ground for relief, even though there was no intentional fraud.
2. By an agreement between the legatees named in a will and the widow (for whom no provision was made), her objections to the probate of the will were to be withdrawn, she was to receive a large part of the estate, and the remainder was to be distributed among the legatees. This agreement was signed by the legatees under a mistake, both as to the size of the estate and their rights therein, resulting from affirmative misstatements made without intentional fraud by one who, with the approval of the widow's attorneys, had undertaken to procure such signatures. *Held,* that in the absence of ratification or estoppel such agreement might properly be canceled in a suit by the legatees.

[3. Whether, no trusts being displaced and the parties with one exception being *sui juris,* said agreement was wholly void as against public policy, is not decided.]

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Modified and affirmed.*

This is an action in equity brought to cancel, on the ground of fraud, an agreement between the legatees under a will on one side and the widow of the testator on the other, by the terms of which the widow's objections to the probate of the will were withdrawn and provisions made for giving

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the widow a considerable portion of the estate and distributing the remainder in different proportions from those fixed by the will.

The facts were not greatly in dispute and were substantially as follows: One Robert Stimpson, a childless widower seventy years of age, living in the village of Fennimore in Grant county, made his will in 1906, dividing the greater portion of his estate of nearly $25,000 among five nephews and nieces living at or near the village of Fennimore, but giving his homestead to *Fred Stimpson,* one of said nephews. Several years afterwards he married *Elizabeth Eastman,* a widow, who survives him and is one of the defendants in this action. The testator never formally revoked or modified his will and died in March, 1917, no children having been born of the second marriage. The will was presented for probate by Malachi Simons, the surviving executor, and an order of hearing made. The widow by her attorneys, Kopp & Brunckhorst, filed objections on the ground that the will had been revoked as matter of law by the testator's subsequent remarriage. On the day of hearing, May 1, 1917, formal proof of the execution of the will was made and the county judge took the question of revocation by the subsequent remarriage under advisement. Thereupon Mr. Brunckhorst, acting for the widow, and Mr. Frank E. Jenswold, an attorney of Fennimore, acting for the proponent, discussed the subject of compromise, the discussion resulting in the drawing up of the agreement in question, by the terms of which it was agreed that all the property should be distributed sixty per cent. to the widow and forty per cent. among the legatees in the same ratio provided by the will, and that in consideration of this agreement the objections to the will be withdrawn and the same admitted to probate. The agreement further contained an assignment and quitclaim by the legatees of all their interests in the real and personal property of the estate to the defendant *D. T. Parker,* as trustee, to distribute the estate as

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provided by the agreement, and gave him authority to sell and deed all the property, real and personal. An additional clause provided for the distribution of the estate in the final decree in accordance with the stipulation. This proposed agreement was signed by Mr. Brunckhorst as attorney in fact for the widow, and taken by Mr. Jenswold to obtain the signatures of the legatees. Mr. Jenswold had not been employed by any of the legatees as their attorney at this time, but with the assent of Brunckhorst he took upon himself to go to the residences of the different legatees at or in the neighborhood of Fennimore as rapidly as possible and state to them in substance that in his opinion the will was revoked by operation of law on account of the remarriage; that the estate was worth probably $55,000; that he thought it would be a good thing for the legatees to save as much of the estate as possible; that if the will was set aside the widow would be the sole heir and would take the whole estate, hence that it would be advisable to settle and that the matter was urgent. The heirs did not know the value of the estate, employed no other lawyer, and one by one signed the agreement under these representations. The agreement having been signed by the legatees and by *Parker*, the widow's objections to the will were withdrawn and the will was admitted to probate. According to the findings of the trial court, based on disputed evidence, the legatee *Fred Stimpson* was then and has since remained hopelessly incompetent mentally. By consent of all parties defendant *Parker* was appointed administrator with the will annexed, gave bond, and proceeded to settle the estate. He sold and deeded the homestead to *Fred Stimpson* for $3,500 and took his note for the amount. The balance of the estate was personal and was speedily turned into cash or its equivalent. There is no testimony showing that the legatees received any information as to the size of the estate during the progress of the administration, although they were informed and approved of the sale of the homestead to *Fred*. They lived at a dis-

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tance from the county seat and apparently were not accustomed to the transaction of business of a legal nature. Early in September, 1917, the administrator was ready to settle the estate and was then informed by the plaintiff *Robert Stimpson* that the legatees were going to contest the matter and that no distribution of the estate should be made under the agreement. *Mr. Parker,* however, made application for the settlement of his final account as administrator and the same came on to be heard before the county court of Grant county October 2d and a final order made assigning the estate to the legatees according to the terms of the will, except that the use of the homestead during widowhood as well as the household furniture and one third of the personal estate was assigned to the widow as provided by law in case of no provision being made for a widow in a will. The order provided also that it was made without prejudice to the agreements and assignments and conveyances theretofore made between the widow and the legatees. The plaintiff *Robert Stimpson* appeared at the hearing of October 2d and announced that the legatees repudiated the agreement, and at the same time it was announced to the county court by the attorneys of the legatees that their clients were willing that the order admitting the will to probate should be vacated. Notwithstanding this notice *Mr. Parker* within a few days paid the widow the sixty per cent. of the estate provided for by the agreement, amounting to nearly $14,000, and this action was brought October 20, 1917. It appears that at some time during the settlement of the estate the widow purchased a small home in the village of Montfort, where she now resides, and for which apparently she paid $600 or $700. During the progress of the action a guardian *ad litem* was appointed for the plaintiff *Fred Stimpson.* Upon these facts the trial court found that the plaintiffs were entitled to cancellation of the compromise agreement and rendered judgment accordingly.

For the appellants there were briefs by *Kopp & Brunck-*

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horst of Platteville and *Frank E. Jenswold* of Fennimore, and oral argument by *L. A. Bruncknorst* and *A. W. Kopp*. *Jesse J. Ruble* of Platteville and *Rufus B. Smith* and *Alfred H. Bushnell* of Madison, for the respondents.

A brief was also filed for respondent *Fred Stimpson* by *Geo. B. Clementson* of Lancaster, his attorney.

WINSLOW, C. J. The findings of fact made by the trial judge are satisfactorily sustained by the evidence; in fact there is little dispute as to most of them. He did not find Mr. Jenswold guilty of intentional fraud, but did find that he stated to most of the legatees that the estate would amount to $55,000 and that he did not state to the legatees their true rights nor the true rights of the widow, but told them that the will was void because of the marriage; that the plaintiffs were ignorant in respect thereto, believed his statements, thought he was looking after their interests, and, without negligence on their part, and supposing that if they did not accept the offer the widow would receive the whole estate, signed the agreement.

Certainly this state of facts entitles the plaintiffs to relief unless they subsequently ratified the agreement or are in some way estopped from contesting it. An application for cancellation of a contract is addressed to the sound discretion of a court of equity. Intentional fraud is not an essential. Substantial mistake on the part of the party seeking relief may be sufficient if such course is in accordance with established rules of equity and seems reasonable and just to the court in view of all the circumstances of the case. *Woldenberg v. Riphan,* 166 Wis. 433, 166 N. W. 21. "It is the *suppressio veri* or the *suggestio falsi* which is the foundation of the right to relief in equity, and this exists whether it were fraudulently or mistakenly done." *Peek v. Gurney,* L. R. 13 Eq. Cas. 79. See, also, *Hammond v. Pennock,* 61 N. Y. 145; *Wilcox v. Iowa Wesleyan Univ.* 32 Iowa, 367; *Severson v. Kock,* 159 Iowa, 343, 140 N. W. 220; 9 Corp. Jur. p. 1167, § 18.

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It is unquestioned here that the plaintiffs signed the agreement while laboring under a vital mistake both as to the law and the fact, which mistake was the result of affirmative misstatements made to them by Mr. Jenswold, who took on himself to procure their signatures with the approval if not by actual direction of the attorneys of the widow.

This entitles them to relief in equity unless they have ratified the agreement by affirmative acts or are for some reason estopped. There is little in the case to support either defense. The only change in the situation of the parties which seems to us to be material or to require notice is the purchase of the homestead for $3,500 by *Fred,* the incompetent. It seems, however, that this may be easily set right. Before closing their case the plaintiffs offered to reconvey the property or to stipulate that the court might take up the matter as a part of the present case and finally adjust it as it ought to be adjusted. We construe this as a stipulation that the court in the present case might by its judgment cancel the deed and do what is necessary to finally close up the controversy. It seems also that *Fred's* note for $3,500 was taken by *Mr. Parker* and apparently is still held by him.

We think the judgment should be modified so as to require the defendant *Parker,* within sixty days after filing the *remittitur* herein in the circuit court, to surrender into that court for the use and benefit of *Fred Stimpson* the said $3,500 note, or, in case the said note has been negotiated and cannot be surrendered, that he deposit in court a sufficient bond, with sureties to be approved by the clerk, conditioned to protect said *Fred Stimpson* and his representatives against said note in the future and indemnify them if they be compelled to pay it. The judgment should also be modified by a provision canceling the deed from *Parker* to *Fred Stimpson* of the homestead, the same being the land fully described in the final order of the county court made in the Stimpson estate proceedings. The parties will then stand substantially as they would have stood had no agreement been made. We cannot regard the purchase by the widow of a small

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home in Montfort as of any consequence on this question. Presumably it is worth all that she paid for it, nor is it affirmatively shown that she was induced to purchase it by reason of the making of the agreement in question. As to the household furniture, amounting to some $44, it appears to have been nominally sold to various legatees, but in fact it appears to be still in the homestead and subject to be taken by the widow at any time.

Upon the argument of the case the question was considerably debated whether the agreement was not wholly void because against public policy under the principles laid down by this court in the cases of *Will of Dardis,* 135 Wis. 457, 115 N. W. 332; *Will of Rice,* 150 Wis. 401, 136 N. W. 956, 137 N. W. 778; and *Estate of Staab,* 166 Wis. 587, 166 N. W. 326. The doctrine of the first of these cases is in brief that public policy requires that a valid will be probated regardless of the wishes of the parties interested, and that it is not within the power of the parties interested to agree to another plan of division and defeat the probate of a valid will. In the *Rice Case* the situation was somewhat different. There, a will containing numerous legacies in trust for infant legatees was presented for probate, objections were filed, and finally all the parties agreed, by way of settlement of the controversy (the infants acting by their guardians *ad litem*), that the will should be probated, but that the plans of the testator should not be carried out and that another plan of division, doing away with the trusts and dividing the property presently, should be carried out. This scheme also was condemned as practically accomplishing the same result as was attempted in the *Dardis Case.*

In the present case there were no trusts displaced and all the parties interested were *sui juris* with the exception of *Fred Stimpson.*

We do not find it necessary to decide whether the agreement here falls within the condemnation of the cases named or not, nor do we intimate any opinion thereon. We have

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referred to the cases in order that it may not be supposed that we did not have the rule in mind.

By the Court.—Judgment modified as indicated in the opinion, and as so modified affirmed, with costs against the appellants.

ROESLER, Appellant, vs. SHASTRI, Respondent.

October 10—November 6, 1918.

Fraud: Bank draft obtained by deceit: Replevin: Evidence: Questions for jury: Physicians and surgeons: License to practice: Hypnotism.

1. The law as to deceit is intended to protect the ignorant and credulous as well as the wise and wary.
2. In replevin to recover a bank draft alleged to have been obtained by defendant through fraudulent representations that he was a licensed physician and could by the use of hypnotic influences cure plaintiff's insane wife, it is *held*, upon the evidence, to have been a question for the jury whether or not plaintiff was so deceived and defrauded; and the direction of a verdict for defendant was error.
3. There being evidence in such case sufficient to warrant a finding that defendant held himself out as a doctor, the fact that he was not required to be licensed to heal by mental science or hypnotic suggestion is immaterial on the question of actual fraud.
4. Although in such case the defendant admitted on the trial that plaintiff's wife was neither cured nor benefited, the plaintiff should have been permitted to prove that she had been injured by the treatment, such proof being pertinent on the issue of fraud.
5. Replevin will lie to recover goods—in this case a bank draft—obtained from the plaintiff by fraud.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

Replevin to recover bank draft of $950 alleged to have been obtained from plaintiff through fraudulent representations of the defendant. Plaintiff, a farmer whose wife had

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been suffering from insane delusions for thirteen or fourteen months and had been at a hospital three times, engaged the defendant to treat her. Plaintiff testifies that defendant held himself out as a doctor and was called such, and it appears that he had used the title M.D. on his letter-heads; that he represented that he could by the use of hypnotic influences cure her, but that he must first destroy her mind entirely and make it like a child's and then build it up again. He assured plaintiff he could cure her, but he had to have $50 per day. Plaintiff agreed to pay that, and at the end of ten days the defendant claimed she was cured thirty per cent. and that the nurse could probably take care of her, but the plaintiff wanted a complete cure and asked defendant to stay longer. He said he could not unless plaintiff made a contract for ten more days at $50 per day. This plaintiff agreed to and defendant remained. At the end of the ten days defendant said she was cured fifty per cent. but that he could not stay longer and that he must have his money. So plaintiff went to town and gave him $50 in cash and the draft in suit. Plaintiff further testified that he believed defendant could cure her and that he could not tell when the draft was given whether she was better or not; that he learned afterward that defendant was no doctor and that his wife had not improved under defendant's treatment. Plaintiff offered to prove by other doctors that his wife grew worse under the treatment given her, but the evidence was excluded, presumably because defendant did not claim that his treatment had been of any benefit to her. It appears that defendant was a native of India who had been in this country since October 30, 1913; that he had been educated in India as a physician in the University of Binjab, but not licensed to practice in the United States; that he had traveled considerably in this country lecturing on Indian subjects and had pursued some medical studies in Chicago and Los Angeles and obtained a medical degree from the latter school. He claims he used hypnotic suggestion only in his

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treatment of plaintiff's wife, but denies that he said he could cure her.

At the close of the evidence the court directed a verdict for defendant on the ground that there was no evidence in the case that defendant represented himself to plaintiff as a doctor or having the right or authority to practice medicine in Wisconsin, and on the further ground that plaintiff at the time he delivered the draft to defendant knew all he knew at the time of the trial and could not have relied upon any representations made by the defendant, who, professing to heal by spiritual or mental means, was not required to have a license in this state.

From a judgment in favor of defendant entered upon the directed verdict the plaintiff appealed.

For the appellant there was a brief by *Lees & Bunge* of La Crosse, and oral argument by *Geo. W. Bunge.*

For the respondent there was a brief by *Morris, Hartwell & Holmes* of La Crosse, and oral argument by *Fred H. Hartwell.*

VINJE, J. We think the court erred in directing a verdict in this case. It was a question for the jury to say whether or not plaintiff was deceived by defendant. The jury had a right to believe plaintiff's testimony and to draw the conclusion therefrom that he was defrauded of his money. He had an insane wife; that he was anxious to cure her is evidenced by the fact that he willingly paid $50 a day in an effort to do so. He was undoubtedly ignorant of what could or could not be done through mental healing or hypnotic suggestion. There is a sharp conflict of views on that subject by those who have given it study and attention. That he did not know is not strange. Neither is it strange that he was unable to diagnose the exact or even relative condition of his wife's mind at the time the draft was delivered. He had been told that her mind must first be wholly destroyed and then built up, and he evidently be-

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lieved that. The law protects the ignorant and credulous as well as the wise and wary. *Miranovits v. Gee,* 163 Wis. 246, 157 N. W. 790. He was told by defendant when he received the draft that her mind was fifty per cent. cured and that the nurse could take care of her afterward. We employ doctors to diagnose disease and to cure it or direct us what to do to effect a cure. That is their profession. When they give advice the patient is justified in following it unless it is so palpably contrary to sense or human experience as to be disbelieved by every one.

There is sufficient evidence in this case to warrant the jury in finding that the defendant held himself out as a doctor. A letter from him to the nurse which was shown to plaintiff has the heading *K. D. Shastri, M.D.,* and is signed *K. D. Shastri, M.D.* He was called doctor and made no protest. The fact that he was not required to be licensed to heal by mental science or hypnotic suggestion is immaterial on the question of actual fraud. An unlicensed person may make fraudulent representations.

Plaintiff should have been permitted to show by other doctors, if he could, that the treatment given his wife by the defendant was injurious and not beneficial. It is true the defendant's counsel on the trial admitted that she was neither cured nor benefited. But plaintiff's offer went further. He offered to prove that she had been injured by the treatment. Such proof was pertinent on the issue of fraud and should have been admitted.

Claim is made that, since in delivering the draft to the defendant plaintiff parted with the legal title thereto, he cannot maintain replevin to recover it. This court has several times negatived that claim and held that replevin will lie to recover goods obtained by fraud. *Singer v. Schilling,* 74 Wis. 369, 43 N. W. 101; *Lee v. Burnham,* 82 Wis. 209, 52 N. W. 255; *Mayhew v. Mather,* 82 Wis. 355, 52 N. W. 436.

By the Court.—Judgment reversed, and cause remanded for a new trial.

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FRONTIER MINING COMPANY and another, Appellants, vs. INDUSTRIAL COMMISSION and others, Respondents.

October 11—November 6, 1918.

Workmen's compensation: Appeal from judgment affirming award: Notice, upon whom to be served.

Notice of an appeal by the employer from a judgment affirming an award under the workmen's compensation act must be served upon the claimants in whose favor such judgment was rendered, they being the "adverse parties," within the meaning of sec. 3049, Stats. Service upon the attorney general (who, though required by law to appear on behalf of the industrial commission, is not made attorney for the claimants) is not sufficient.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Dismissed.*

The respondents *Hynes* and wife filed a claim with the *Industrial Commission* for compensation on account of the death of their minor son, alleged to have been accidentally killed while in the employ of the appellant mining company. The *Commission* made an award in their favor, whereupon the mining company and the insurance company which had insured the risk brought this action to set aside the award. The claimants did not appear in the circuit court, but the attorney general appeared for the *Commission,* and after a trial was had the award of the *Commission* was confirmed and the mining company and insurance company gave notice of appeal to this court. The notice was directed to the attorney general and his assistant, Mr. Messerschmidt, who appeared for the *Commission* in the trial court, also to the clerk of the trial court. It was served on the attorney general and clerk, but not on the claimants *Hynes* and wife. The respondent *Commission* now moves to dismiss the appeal because the notice was never served on the claimants and the time for appealing has expired.

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The cause was submitted for the appellants on a brief signed by *Roehr & Steinmetz*, attorneys, and *Ida E. Luick*, of counsel, all of Milwaukee, and for the respondent *Industrial Commission* on that of the *Attorney General* and *J. E. Messerschmidt*, assistant attorney general.

WINSLOW, C. J. The statute provides that in such cases as the present it shall be the duty of the attorney general to appear on behalf of the *Industrial Commission* both in the circuit court and on appeal in this court. Sec. 2394—22, Stats. 1917. It is further provided that any party aggrieved by the judgment of the circuit court in such an action as the present may appeal therefrom within the time and in the manner provided for appeals from orders of the circuit court. Sec. 2394—21. Appeals from orders are taken by serving notice of appeal on the "adverse party" and on the clerk of the trial court within thirty days from the date of service of a copy of the order with notice of the entry thereof. Secs. 3042, 3049. In the present case the notice of appeal was not served on the claimants and the time limited for service thereof has expired. It seems clear that the motion must be granted. The claimants, in whose favor the judgment below was rendered, are manifestly the "adverse parties" upon whom the statute requires service of the notice of appeal. They own the judgment of which the appellants complain and are the only persons who have any substantial pecuniary interest in maintaining it.

True, the *Industrial Commission* is also a party defendant and the law requires the attorney general to appear for the *Commission* in the circuit court and in this court. It is true also that in defending the award for the *Commission* he necessarily defended the interests of the claimants, but nowhere does the statute make him their attorney; on the contrary the statute expressly says that he shall appear "on behalf of the commission." The legislature could doubtless make him the attorney of the claimant at least for the pur-

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poses of perfecting the appeal, but this court has no power to do so.

By the Court.—Appeal dismissed without costs.

OWEN, J., took no part.

STATE EX REL. HAVEN, Attorney General, Appellant, vs. SAYLE and others, Respondents.

October 11—November 6, 1918.

Elections: License question: Madison city charter: Board of canvassers: De facto officers: Attorney general: Authority to bring action: Supreme court: Original jurisdiction.

1. Where the mayor and holdover aldermen of the city of Madison, claiming in good faith to be the legal board of canvassers, met and canvassed the votes cast at a referendum election on the question of license, they constituted a *de facto* canvassing board and the canvass was valid.
2. Under the special charter of the city of Madison (ch. 36, Laws 1882) and sec. 1565*a*, Stats., the mayor and holdover aldermen constitute the proper canvassing board in that city, not only for the regular municipal election, but also for a referendum election on the question of license.
3. The provision in sec. 10.42 Stats., that "except as otherwise provided by law, the common council of every city shall canvass the returns and declare the result of every annual, special or referendum election held in and for such city," does not supersede or affect different provisions on that subject in special city charters.
4. The objection that the attorney general had no right to bring an action in the circuit court should be raised by demurrer.
5. Except as authorized by statute the attorney general cannot sue in the circuit court in the name of the state or in his official capacity.
6. Sec. 3236, Stats., relating to actions by the attorney general to restrain corporations or individuals from exercising corporate rights which have never been granted, is not applicable to an action involving only the question as to which city officials should exercise a power (in this case the power to canvass the returns of an election in the city) which has been granted.

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7. Such an action can be brought by the attorney general in the circuit court only on request of the governor or of one branch of the legislature.
8. Such an action, though *publici juris*, is of purely local concern and the remedy in the lower courts is ample; hence it is not within the original jurisdiction of the supreme court as that jurisdiction has been defined.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Modified and affirmed.*

This is an action in equity brought on behalf of the state on relation of the attorney general against the mayor and common council of the city of Madison to perpetually enjoin them from recounting the votes cast at a referendum election on the question of license held April 2, 1918. A preliminary injunctional order served with the complaint was dissolved upon motion based upon affidavits and the plaintiff appeals. The material facts appearing by the complaint and affidavits were in substance these: The mayor and holdover aldermen of the city, claiming to be the legal board of canvassers, met April 6, 1918, canvassed the vote, and declared the result to be that 3,995 votes were cast for license and 4,024 against. Subsequently petitions were filed in the manner required by sec. 6.66, Stats. 1917, asking for a recount of the ballots in certain precincts. In another action brought prior to the present action it was held by the circuit court for Dane county that under sec. 10.42, Stats., the common council constituted the legal canvassing board in the case of a referendum election, and in accordance with that decision the council was about to enter upon the recount when this action was commenced and a temporary injunctional order obtained.

The plaintiff claims that there has been no canvass of the vote cast at the election because the common council was the legal canvassing board and not the mayor and holdover aldermen; and that there can be no recount until there has been an original canvass made.

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The special charter of the city of Madison (ch. 36, Laws 1882) provides that the mayor and holdover aldermen shall constitute the canvassing board for the regular municipal election and that "Special elections to fill vacancies, or for any other purpose, shall be held and conducted by inspectors of election, as provided by this act, and returns thereof shall be made in the same time, form and manner as of annual elections."

Sec. 1565*a*, Stats., provides, and has provided since 1898, that the returns of license referendum elections shall be canvassed in the manner in which other elections in such city, town, or village are canvassed.

Sec. 10.42, Stats., provides that "Except as otherwise provided by law the common council of every city shall canvass the returns and declare the result of every annual, special or referendum election held in and for such city." The question on the merits which was chiefly debated in the case was whether this latter provision of the general election law controlled or whether the provisions of the charter were still in force.

The circuit court held that the mayor and holdover aldermen constituted at least a *de facto* canvassing board whose acts had legal effect, and that the proper canvassing board in case of a referendum election was the common council, and dissolved the temporary injunctional order.

From the order of dissolution the plaintiff appeals to this court.

For the appellant there was a brief by the *Attorney General* and by *J. J. McDonald* and *Gilbert & Ela* of Madison, counsel, and oral argument by *Mr. Emerson Ela* and *Mr. McDonald.*

William Ryan, city attorney, for the respondents except *A. M. Peltier.*

For the respondent *Peltier* there was a brief by *Ralph W. Jackman* and *C. F. Lamb* of Madison, and oral argument by *Mr. Jackman.*

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WINSLOW, C. J. We have no doubt that the trial court was right in holding that the mayor and holdover aldermen constituted a *de facto* canvassing board. They were in undisturbed possession of the office, assuming in good faith to exercise, and in fact exercising, all its functions, and no one even questioned their title. Hence their canvass was valid and a recount may properly be had. *State ex rel. Dunn v. Noyes,* 87 Wis. 340, 58 N. W. 386; *In re Woolcott,* 163 Wis. 34, 157 N. W. 553.

We are further of opinion that the provisions of the charter are not affected by the provisions of sec. 10.42, Stats., and hence that the *de facto* board was the *de jure* board as well. Sec. 10.42 first appeared in its present shape in ch. 385, Laws 1915, which was purely a revision law having for its object not a change in the law in any respect, but simply to revise all the general laws of the state relating to local elections and embody them in a single new chapter.

Prior to this act the section in question had been sec. 925—268 of the Statutes, first appearing as sec. 268 of ch. 326, Laws 1889 (the general city charter law). It declared simply that the council of each city should meet at a certain time and canvass and declare the result of the annual municipal election. It did not apply to cities acting under special charters, but only to those organized under the general law.

When in the course of the topical revision of the statutes now in progress it was decided to group all the statutes relating to elections in ch. 10, this section and others relating to municipal elections were collected together by ch. 385 before mentioned, and the words "except as otherwise provided by law" were prefixed to the section, in order to make it clear that it applied, as before, to cities acting under the general charter only. Hence the mayor and holdover aldermen constitute the proper canvassing board of the city of Madison; and this not only for the regular municipal election, but also for a referendum election such as the present,

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because the charter provides for the holding of special elections and the making of returns in the same manner as annual city elections, and, furthermore, sec. 1565*a*, Stats., governing license referendum elections, specifically provides for the canvassing of returns as in case of other city elections.

The respondents challenge the right of the attorney general to bring this action without authority from the governor. Strictly speaking, probably this question should be raised by demurrer, but inasmuch as it has been fully briefed and argued without objection it seems proper to consider it now.

As pointed out in *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900, the powers of the attorney general are limited by statute, and he must find authority in the statute when he sues in the circuit court in the name of the state or in his official capacity.

The appellant relies on sec. 3236 of the Wisconsin Statutes, which authorizes the attorney general to bring action in the name of the state to restrain a corporation from exercising any franchise, liberty, or privilege not authorized by its charter, or to restrain individuals from exercising corporate rights, privileges, or franchises not granted to them by law.

We cannot regard this section as applicable. Its purpose is to prevent usurpation, *i. e.* the exercise of corporate powers which have never been granted. Here the power to make the canvass *has* been granted, and the only question is which city officials are empowered to exercise it.

Were the case within the original jurisdiction of the supreme court, *i. e.* were state officers charged with violation of law, and were the attorney general filing an information in equity in this court to restrain such act, the suit might be entertained simply by obtaining leave of court, but this results from the grant of prerogative jurisdiction to this court by the constitution, as explained in the case of *Att'y Gen. v.*

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Railroad Cos. 35 Wis. 425. See, also, *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164.

While the action is *publici juris* it is purely of local concern and the remedy in the lower courts is ample, hence it is not within the original jurisdiction of this court as that jurisdiction has been defined.

Turning to the general duties of the attorney general as to actions in the lower courts, we find that "when requested by the governor or either branch of the legislature" he is to appear for the state and prosecute or defend actions in those courts in which the state is interested. Sec. 14.53, Stats. 1917.

No such request appears in the present case, nor are we referred to any other section giving him authority on his own motion to commence such an action as the present on behalf of the state in the circuit court.

Our conclusion is that such an action as the present, if brought by the attorney general in the circuit court, must be brought on request of the governor or one branch of the legislature.

Other points are made by the appellant, but are not deemed well taken and are overruled without discussion.

It follows that the injunctional order was rightly dissolved as to the mayor and holdover aldermen, but as to the newly elected aldermen it should have been retained in force, and the order appealed from must be modified accordingly.

By the Court.—Order modified as indicated in the opinion, and as so modified affirmed, without costs.

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OCONTO ELECTRIC COMPANY, Respondent, vs. OCONTO SERVICE COMPANY, imp., Appellant.

October 11—November 6, 1918.

Judgment: On appeal: Matters concluded: Public utilities: Contracts for municipal lighting: Stipulation before railroad commission: Specific performance: Equitable estoppel: Injunction.

1. A former decision in this court that the plaintiff company's contract with a city for municipal lighting was valid and that a similar contract between the city and the defendant company was invalid, did not involve questions as to the city's right to breach plaintiff's contract or as to plaintiff's right to enforce specific performance; and neither of those matters is *res judicata.*
2. A contract with a city to do municipal lighting may be specifically enforced where it has a distinctive and peculiar value other than a pecuniary one and where a remedy by way of damages for its breach would be inadequate.
3. A stipulation between rival lighting companies, made in a proceeding before, and at the suggestion of, the railroad commission, providing, among other things, that if it should be determined (in pending or proposed litigation) that one of said companies was entitled to do certain municipal lighting it might for a time use the equipment of the other company for that purpose, was in the nature of a contract and enforceable as such.
4. In view of the material change in plaintiff's former status, induced by the conduct of the city and the defendant company connected with said stipulation, and the expense and delay occasioned by plaintiff's prosecution of the former action in reliance thereon, the court should intervene, on the ground of equitable estoppel, to restrain the city from breaching the contract with plaintiff and to enforce specific performance of it and of the stipulation.
5. Injunction is a proper remedy, in such a case, to enforce plaintiff's rights and prevent irreparable injury.

APPEAL from an order of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

This is an action brought by the *Oconto Electric Company,* a public service corporation which has an indeterminate permit to do public commercial lighting in the city of

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Oconto, against the city of Oconto and the *Oconto Service Company,* which has a similar permit, (1) to declare void the acts of the mayor and common council of Oconto in resolving to breach an existing contract for public lighting made between the city and the plaintiff in 1914 and expiring August 7, 1919, the validity of which has already been upheld by this court, and requiring the city to perform the contract; (2) to declare void and set aside, on the ground of false representations alleged to have procured them, certain resolutions and contracts of the mayor and common council of Oconto, entering into a new contract with the *Oconto Service Company* for public lighting for the period commencing August 7, 1917, and ending August 7, 1927; (3) to compel specific performance of plaintiff's contract and of a certain stipulation entered into between the rival companies before the Wisconsin railroad commission pending litigation then proposed, as to which the plaintiff now claims an interpretation requiring the defendant, which has only poles, wires, and plant sufficient to perform said public lighting in Oconto, to surrender the same to the plaintiff company and permit the same to be used by the plaintiff in the performance of the same service at such compensation as may be fixed by the railroad commission, until the two companies can agree upon a sale price or until plaintiff can supply a duplicate equipment of its own.

The defendants demurred separately to the complaint as not stating a cause of action as against both defendants and each separately. The trial court overruled the demurrers. The *Oconto Service Company* appeals from the order.

For the appellant there were briefs by *Kittell, Joseph & Redfield* of Green Bay, *Classon & O'Kelliher* of Oconto, and *John Thompson* of Oshkosh, and oral argument by *Lynn D. Joseph.*

For the respondent there was a brief by *Allan V. Classon* of Oconto and *Greene, Fairchild, North, Parker & McGillan* of Green Bay, attorneys, and *George G. Greene* and *Jerome*

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R. North, of counsel; and the cause was argued orally by *Mr. North.*

SIEBECKER, J. The appellant insists that the city has the right to breach plaintiff's contract with the city (dated May 20, 1914) for doing the municipal lighting in Oconto for five years from August 7, 1914, upon the authority of the decision of this court in the action brought by plaintiff against the city and appellant (then the Peoples Land & Manufacturing Company), which is reported in 165 Wis. 467, 161 N. W. 789. The claim is made that this court then adjudged and determined, by affirming the holding of the trial court, that the city had the right to breach plaintiff's contract. The circuit court held and adjudged that this contract beween the parties was valid and binding upon the parties "except as to the rate for service fixed thereby;" "that said *Oconto Electric Company* is not entitled to specific performance of said contract, but in case of breach thereof by said city is limited to the remedy of an action at law for damages." Upon this ground the appellant asserts that the city is within the right there established when it expressly canceled plaintiff's contract. As appears in the report of that case, the city council had made two contracts, one with the respondent and one with the appellant, for doing the municipal lighting for five years from August 7, 1914, and that the appellant and respondent each insisted on the validity of its contract to do the municipal lighting for that period. These respective claims under these contracts led to the prosecution of the litigation and a determination of the issues raised by the respective claims of the parties under the contracts.

It appears from the record that this court reversed the determination of the circuit court by adjudging that the appellant had no valid contract to do the municipal lighting for the five years beginning August 7, 1914, and affirmed the trial court's decision that respondent's contract to do

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such lighting was valid and entitled it to occupy the municipal lighting field for that period. As a consequence of this determination by this court there was no question presented to this court to determine the right of the city to breach respondent's contract or to have it specifically performed. These questions are not necessarily involved in the decision of this court, nor did the court consider that such questions were determined by the decision of the case. The mandate of this court clearly did not approve what the trial court held to be the rights of the parties in the light of the facts found by it which were in part reversed by this court and thus eliminated these questions from the decision rendered. It follows that the former decision is not *res judicata* upon the right of the city to breach respondent's contract nor upon the question that respondent's contract is not specifically enforceable. The contract of the plaintiff with the city is of a class that have been deemed within the equitable jurisdiction for relief by specific performance when it appears that they are of a distinctive and peculiar value other than a pecuniary one, and where the relief in damages is not an adequate and efficient remedy to make good the loss sustained for a breach. *Burlington v. Burlington W. Co.* 86 Iowa, 266, 53 N. W. 246; *Walla Walla v. Walla Walla W. Co.* 172 U. S. 1, 19 Sup. Ct. 77; *Columbia W. P. Co. v. Columbia,* 5 S. C. 225; *Chicago M. G. L. & F. Co. v. Lake,* 130 Ill. 42, 22 N. E. 216; *Bienville W. S. Co. v. Mobile,* 112 Ala. 260, 20 South. 742; *Edison I. Co. v. Eastern Pa. P. Co.* 253 Pa. St. 457, 98 Atl. 652.

There can be no question of the binding effect of the provision of the stipulation made by the parties at the suggestion of the railroad commission and that such agreements are in the nature of contracts and subject to enforcement as such. *Deen v. Milne,* 113 N. Y. 303, 20 N. E. 861.

The allegation of fact concerning the making of this stipulation, the conduct of the parties connected therewith, plaintiff's prosecution of the former action in reliance there-

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on, the costs and expenses incurred by plaintiff on account thereof, and the delays occasioned thereby in the enforcement of its rights under the contract, constitute such a material change of its rights and former status, to its disadvantage, which were induced by the appellant's and city's conduct, that they cannot now in conscience and equity be permitted to assume a different position which would deprive plaintiff of the fruits of the former litigation and an enforcement of its contract with the city established in that litigation. The morality and justice of the transaction and the rights of the plaintiff appeal especially to conscience and equity and afford a solid ground for the interposition by the court upon the principles of equitable estoppel. The grounds of such estoppel are clearly stated as follows:

"While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies, or objections to the prejudice of the one misled." 16 Cyc. 805.

The city fully acquiesced in and accepted the benefits of the stipulation and the fruit of plaintiff's action, prosecuted in reliance thereon, and it would be unconscionable to permit it now to take the position of repudiating plaintiff's established right, to which it cannot now be restored nor be awarded a complete, adequate, and efficient remedy in a legal action. We are satisfied that the city should in equity be prohibited from canceling the plaintiff's contract and from refusing specific performance thereof as established in the former judicial proceeding under the stipulation of the parties. We are of the opinion that the complaint states a good cause of action for restraining the city from breaching such contract and thus compel it to perform the same. Injunction is a proper remedy for enforcing the rights of the plaintiff under the facts and circumstances presented here,

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tending to show an irreparable injury. *Ed. Schuster & Co. v. Kuryer P. Co.* 165 Wis. 327 (162 N. W. 173) and cases cited on p. 330; *Chicago M. G. L. & F. Co. v. Lake,* 130 Ill. 42, 60, 22 N. E. 216; *Walla Walla v. Walla Walla W. Co.* 172 U. S. 1, 12, 19 Sup. Ct. 77.

The trial court properly overruled the demurrer to the complaint.

By the Court.—The order appealed from is affirmed.

STATE EX REL. HAZELTON vs. TURNER, Circuit Judge, and another.

October 11—November 6, 1918.

Court commissioners: Vacancy: Acceptance of federal office: Constitutional law: Appointment made by judge while out of state: Filing: Term of office.

1. Under sec. 3, art. XIII, Const. Wis., acceptance of the office of United States commissioner by a court commissioner of this state *ipso facto* vacated the latter office; and no proceeding to declare the office vacant was necessary.
2. Where the language of a constitutional provision is clear and unambiguous, no room is left for practical construction.
3. The appointment of a court commissioner by the circuit judge is a ministerial or administrative, not a judicial, act. Not being a completed act until filed as required by sec. 113.14, Stats., an appointment made by the judge while out of the state is valid when so filed.
4. Under sec. 113.14, Stats., after the expiration of the term of office of the circuit judge who appointed him, a court commissioner merely holds over until his successor is appointed and qualified, even though the judge has been re-elected and has entered upon another term.

THIS is an action of *mandamus* brought in this court to compel the defendant W. J. TURNER, as circuit judge, to revoke an order terminating the authority of the relator to act as court commissioner in and for Milwaukee county, and also to revoke an order appointing the defendant *Max Nohl* court commissioner in said county in place of relator.

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The facts in the case are set forth in the return to the writ. Prior to May 27, 1905, the relator held the office of court commissioner in Milwaukee county. On this date he held the office pursuant to an appointment which created a term to expire the first Monday of January, 1906. On May 27, 1905, he received and accepted the office of United States commissioner for a term of four years from the last named date. Thereafter the relator received successive appointments to these two offices. On September 18, 1913, defendant Judge TURNER appointed the relator to the office of circuit court commissioner, no term being stated. The relator claims the right to the office under this appointment. At the time of this appointment Judge TURNER was holding office under a term which expired the first Monday in January, 1915. The relator after his first appointment, May 27, 1905, to the office of United States commissioner received, accepted, qualified, and served under successive reappointments to said office, each for a term of four years, the last being dated May 10, 1917. The claim that the relator, by holding the federal office, had vacated his office of circuit court commissioner was called to the attention of the defendant Judge TURNER in December, 1917. The defendant *Nohl* had been circuit court commissioner, his term expiring January 7, 1918. The defendant *Nohl* applied to Judge TURNER for appointment to fill the vacancy alleged to exist by reason of relator's acceptance of the federal office. The defendant Judge TURNER was in Florida at the time, and after some communication with the relator appointed the defendant *Nohl* to fill the office formerly occupied by relator and which he regarded vacant on account of the acceptance by relator of the federal office. The appointment which was made in Florida was duly filed and the defendant *Nohl* qualified and entered upon the duties of his office. A question being raised as to the validity of the appointment made by Judge TURNER while out of the state of Wisconsin and in Florida, Judge TURNER, after his return

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to the state and while in Milwaukee county, reappointed the defendant *Nohl* and the latter again accepted and qualified.

The relator demurred to the return and the issues before the court raise questions of law.

G. W. Hazelton, relator, in *pro. per.,* contended, *inter alia,* that early in the history of the state Judge MILLER of the United States district court decided that a United States commissioner did not hold an "office of profit or trust under the United States" within the meaning of sec. 3, art. XIII, Const. That decision was accepted and approved by federal and state judges, by the bar of the state, including the lawyers who were members of the constitutional convention, and by the public at large, and was carried into actual practice without dissent for more than sixty years. That construction is now binding and unassailable. See authorities cited in note to *Ableman v. Booth,* 11 Wis. 498, 522. "Under the United States" means under the United States *government,* and the exception of postmasters indicates that the officers referred to were officers appointed by the same authority as were postmasters. The court commissioners appointed by the federal judges are mere arms of the court, to assist in discharging its duties. *U. S. v. Berry,* 2 McCrary, 58. The United States government has nothing to do with their appointment and no power to remove them. The term of the relator as circuit court commissioner under the statute could not be abbreviated except upon due notice and hearing and due proof of misconduct or of disability. The claim that an arbitrary removal, as in this case, was warranted is inconsistent with the act fixing the term, with public interests, and with the state and federal constitutions. *Perkins v. Auditor,* 79 Ky. 306; *Lucas v. Board of Comm'rs,* 44 Ind. 524; *Stuart v. Palmer,* 74 N. Y. 183; *Westervelt v. Gregg,* 12 N. Y. 202, 209; *Dartmouth College v. Woodward,* 4 Wheat. 518. The appointment of a successor to the relator, made while the judge was outside of the state, was a

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nullity. *Price v. Bayless,* 131 Ind. 437, 31 N. E. 88; *Buchanan v. Jones,* 12 Ga. 612; *State ex rel. Att'y Gen. v. Messmore,* 14 Wis. 163; *McIntosh v. Bowers,* 143 Wis. 74, 126 N. W. 548; and other cases.

For the defendants there was a brief by *Doerfler, Green, Bender & McIntyre,* attorneys, and *Walter H. Bender,* of counsel, all of Milwaukee, and oral argument by *Walter H. Bender.*

KERWIN, J. The contention on the part of the relator is (1) that the defendant Judge TURNER was in error in his conclusions to the effect that under the state constitution the relator's acceptance of the federal office vacated the state office, hence the appointment of the defendant *Nohl* was unauthorized and void; (2) that the appointment of defendant *Nohl* was void because made by defendant Judge TURNER while he was without the state of Wisconsin; (3) that the office of relator could not be abbreviated nor could he be deprived of it without notice and hearing.

1. We see no escape from the proposition of law that the acceptance by the relator of the office of United States commissioner operated to vacate *ipso facto* his office of circuit court commissioner. The constitutional provision particularly lays down the rule which governs this case as follows: "No member of Congress, nor any person holding any office of profit or trust under the United States (postmasters excepted) . . . shall be eligible to any office of trust, profit or honor in this state." This language is clear and leaves no question for consideration as to the incompatibility of the offices. Sec. 3, art. XIII, Const. Wis. Nor can there be any question that the office of court commissioner is an office of profit or trust under the United States. It is clearly an office. *In re Appointment of Revisor,* 141 Wis. 592, 124 N. W. 670. It is equally clear that it is an office of both profit and trust and is an office under the United States. *U. S. v. Mouat,* 124 U. S. 303, 8 Sup. Ct.

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505; *U. S. v. Germaine,* 99 U. S. 508; *U. S. v. Smith,* 124 U. S. 525, 8 Sup. Ct. 595; 2 U. S. Comp. Stats. Anno. (1916) § 1333, p. 2189.

The relator seems to rely upon *U. S. v. Berry,* 2 McCrary, 58, and *State ex rel. Wheeler v. Nobles,* 109 Wis. 202, 85 N. W. 367, but a careful examination of these cases shows that they are distinguishable from the instant case and not controlling on the question now before us. *Foltz v. Kerlin,* 105 Ind. 221, 4 N. E. 439, 5 N. E. 672; Throop, Pub. Off. § 39; 29 Cyc. 1383; *Rodman v. Harcourt,* 4 B. Mon. (Ky.) 224; Mechem, Pub. Off. § 430.

The relator seeks to escape the plain language of the constitutional provision referred to on the ground that the two offices are not incompatible and also on the ground of practical construction. The question of incompatibility of the two offices is foreclosed by the constitutional provision referred to and not open for consideration. This provision of the constitution is clear and no room is left for practical construction. *State ex rel. Postel v. Marcus,* 160 Wis. 354, 152 N. W. 419; *Van Dyke v. Milwaukee,* 159 Wis. 460, 150 N. W. 509; *Lawrence Univ. v. Outagamie Co.* 150 Wis. 244, 136 N. W. 619.

The relator having vacated the office of circuit court commissioner in Wisconsin by the acceptance of the federal office, the defendant Judge TURNER had the power and it was his duty to fill the office, and no proceeding was necessary to declare the vacation of the office. Mechem, Pub. Off. § 425.

It is further contended by relator that the appointment of the defendant *Nohl* to the office of circuit court commissioner made by defendant Judge TURNER while in Florida was invalid. The act of appointment was not a judicial act, but ministerial or administrative. *In re Appointment of Revisor,* 141 Wis. 592, 124 N. W. 670. The appointment is made by the circuit judge, not by the court. Sec. 113.14,

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Stats.; Mechem, Pub. Off. § 104; *In re Appointment of Revisor, supra.*

It appears, however, from the record that after Judge TURNER returned to Wisconsin he made a second appointment of the defendant *Nohl.* If any defect existed in the former appointment made while in Florida, it was cured by the latter. Moreover, the appointment was not a completed act until filed in the city of Milwaukee as required by sec. 113.14, Stats., therefore we are convinced that the appointment made in Florida, when filed as required by the statute, was a valid appointment.

2. It appears from the record that the last appointment of the relator made to the office of circuit court commissioner was made by Judge TURNER on September 18, 1913. Judge TURNER was then serving a term of office which expired on the first Monday of January, 1915. Sec. 113.14, Stats., provides that the court commissioner "shall hold office during the term of office of the judge who appointed him, and until his successor is appointed and qualified, unless sooner removed by the judge appointing him." The term of Judge TURNER expired on the first Monday of January, 1915. Sec. 113.01, Stats. So that after the expiration of the term of Judge TURNER which expired January, 1915, the relator was merely holding over as circuit court commissioner, therefore his term as such holdover officer was subject to be terminated at any time at the will of defendant Judge TURNER by the appointment of a successor, and was terminated when the defendant *Nohl* was appointed and qualified. Mechem, Pub. Off. § 401.

By the Court.—The writ is denied without costs.

OWEN, J., took no part.

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DRINKWATER, Plaintiff in error, vs. THE STATE, Defendant in error.

October 11—November 6, 1918.

Criminal law and practice: Homicide: Evidence: Competency: Refreshing memory of unwilling witness: Expression of opinion by trial judge: Harmless errors.

1. Upon a trial for murder by shooting with a revolver, it was not error to permit a witness for the state, who testified that he had seen the revolver once before in a city near the place of the shooting, to state further that at that time he and the defendant went to the city together and remained two days alone in her house—such statement having been admitted to show the circumstances under which he saw the weapon, and not having been commented upon in the argument to the jury.
2. It was, in this case, within the discretion of the trial court to permit the prosecuting attorney to refresh the memory of an obviously unwilling witness for the state by calling his attention to what he had said at the coroner's inquest.
3. In a criminal case the trial judge should refrain from expressing in the presence of the jury his view as to the probative force of the evidence upon any phase of the alleged guilt of the defendant, and should rule upon objections or requests made without comment upon what the evidence shows.
4. In this case, however, the refusal to submit to the jury the question of excusable homicide and a statement by the judge to the effect that it was an undisputed fact that defendant was culpably negligent in having a revolver in her pocket and in taking it out and hammering the deceased with it as she testified she did, are *held* not to have been errors affecting any substantial right of defendant or such as should work a reversal, the jury not having found defendant guilty of killing by culpable negligence (manslaughter in the fourth degree, under sec. 4363, Stats.), but having evidently believed that she recklessly and voluntarily fired the shot regardless of the result, and so found her guilty of the higher offense of murder in the second degree under sec. 4339.

ERROR to review a judgment of the circuit court for Crawford county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Plaintiff in error, hereinafter called the defendant, was convicted of murder in the second degree for the shooting

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of Frank A. Drinkwater on the 25th day of March, 1918, at Bridgeport in Crawford county. In April, 1894, defendant married the deceased, and they had one son, Donovan, seventeen years old at the time of the trial in May, 1918. Defendant had been married prior to her marriage to deceased and had one daughter, Lola Andrews, by such marriage. At the time of the shooting she was forty-two years old and the deceased was thirty-nine. For at least fourteen years prior to his death the deceased had most of the time been either a bartender or saloonkeeper in various places in Southwestern Wisconsin, and the evidence showed that he drank considerably and steadily, though never to such an extent as to be helpless, and that especially when drunk he was quite quarrelsome and irritable, though the evidence on this subject is somewhat conflicting. In November, 1916, the defendant obtained a divorce from the deceased on the ground of cruel and inhuman treatment, and went to live at Prairie du Chien, but in November, 1917, at the solicitation of deceased, she returned to Bridgeport to work for him at a salary of $10 a week. She was cook, housekeeper, and assisted in tending bar. It seems that a young man by the name of Roy Pugh was somewhat attentive to the defendant, at least the deceased so thought, and it made him angry and jealous. On the evening of the shooting Pugh came into the saloon and was waited upon by the defendant. He remained about fifteen or twenty minutes and then went down the street some distance. A little later the defendant also went down the street followed by her son Donovan. Pugh was then standing in the street. She returned to the saloon, and as she was leaving the second time she testified she heard the deceased say "I will get 'em," whereupon she went back in again, got a revolver and put it inside of her stocking, and then went down the street and joined Pugh. The two walked across the covered bridge of the Wisconsin river, and while on the bridge defendant took the revolver out of her stocking because it hurt her and put it in her

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right-hand sweater pocket, where she had to hold it with her right hand to keep it from falling out. Upon returning to Bridgeport they went up past the saloon toward the post-office. As they did so the deceased, who had been drinking heavily that day, came out and told her in an angry tone that she did not need to get the mail because Donovan had gotten it. She replied that he did not get her mail, and she and Pugh continued to walk up the street. The deceased threw down some stove wood he had in his arms and followed them up to the postoffice and back again, during which time angry words passed between them. She says he told her that "you are going to start something that I am going to finish for you," or that she had started something tonight and that if she was not "damn careful he would finish it." When defendant and Pugh started to go down the street the deceased stood on the walk directly in front of them and so they stepped into the street and went down the middle of it. The deceased kept pace with them on the sidewalk and the quarrel continued. As they approached the saloon the defendant walked over to the sidewalk and came quite close to it. While out in the street one Luther McKinley, a friend of both defendant and deceased, came out into the street and spoke a few words to her to the effect that she ought not to go with Pugh. She told him she was divorced from her husband and had a right to go with Pugh if she wanted to. As she approached the sidewalk in front of the saloon deceased asked her in an angry tone if she was not going to come in. She replied that she was not in any hurry. He said, "Are you coming in here?" She said, "No, I ain't," and he replied, "By God, I will show you." She also testified on both direct and cross examination that he said "Come on and get your damn rags and go to Prairie and take the cur over there and live with him," meaning Pugh, and that when he said "By God, I will show you," he grabbed hold of her left sleeve or arm with his right hand and pulled her towards the sidewalk; that he

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grabbed at her throat with his left hand, and then she took the revolver out of her sweater pocket with her right hand and struck him on the hand twice, and his hand slipped down on her arm. He then got hold of her right arm with his left hand and with both hands pulled her towards him, and then the gun was discharged. The evidence of just what occurred at the scuffle is not very clear, and defendant, Pugh, and McKinley, all close eye-witnesses, differ some as to details. The deceased refused to make a statement to the doctor that evening, saying he would tell him later, but died early next morning without making any statement. The bullet entered his abdomen a little above and to the left of the navel.

The court submitted to the jury the questions of whether defendant was guilty of (a) murder in the first degree; (b) murder in the second degree; (c) manslaughter in the second degree under sec. 4351, Stats. 1915; (d) manslaughter in the fourth degree under sec. 4362, Stats. 1915; or whether the homicide was justified under sec. 4366, Stats. 1915. It refused to submit the question of whether the homicide was excusable under sec. 4367.

For the plaintiff in error there was a brief by *J. S. Earll* of Prairie du Chien and *C. J. Smith* of Viroqua, and oral argument by *Mr. Earll.*

For the defendant in error there was a brief by the *Attorney General* and *J. F. Baker* and *J. E. Messerschmidt,* assistant attorneys general, and oral argument by *Mr. Messerschmidt.*

VINJE, J. Error is assigned because the witness Pugh, after testifying on behalf of the state that he had seen the gun used by defendant once before in Prairie du Chien about the 20th of March, was permitted to state that defendant and he came to Prairie du Chien together and that they remained two days alone in her house. On cross-examination he testified that he came to get some books from her and

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that nothing improper occurred between them while he was there. It is urged that this testimony served to prejudice the jury against defendant and should not have been admitted. Its relevancy is not very great. It was probably admitted to show the circumstances under which he saw the gun so that there could be no mistake about the fact that he did see it. That such circumstances were of a character perhaps somewhat prejudicial to defendant was due to her own conduct. There is nothing in the record to show that this evidence was in any way commented upon in the argument of the case to the jury and we cannot say that its reception was error, much less prejudicial error.

It is further claimed that the court erred in permitting the state to cross-examine or impeach its own witness, Pugh. Upon the trial he was quite vague and indefinite as to what he saw and heard at the time and just preceding the firing of the fatal shot. He said the shot came from the direction of the defendant and thought she had her right hand in front of her; that was about as much as he could remember he saw. Questions and answers taken from his testimony given before the coroner's inquest the next day after the shooting were then read to him and he admitted he made answers as therein contained or else that he did not remember. His testimony at the inquest was to this effect: He was right by defendant's side when she fired the shot; saw the gun in her hand; saw her fire it, and that it seemed to be aimed at the stomach of deceased. It was evident that Pugh was an unwilling witness on the part of the state at the trial. But he was one of the only two eye-witnesses to the shooting besides the defendant and had to be called by the state. A wide discretion must be allowed trial courts in permitting counsel to refresh the recollection of a witness that apparently does not wish to remember. Here nothing more was done. The testimony taken before the coroner was not introduced. No impeachment of his testimony was attempted, but his recollection was sought to be refreshed by

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calling his attention to what he said upon the inquest. It was within the discretion of the trial court to permit that to be done with this witness under all the circumstances shown. The trial court could better judge of the unwillingness of the witness than we can, though that appears clearly enough from the record.

The court was asked to submit the question of excusable homicide, but refused to do so, saying in the presence of the jury, "Now, according to defendant's own testimony she had that revolver, she had it in her right-hand pocket, and she took it out; that she began to hammer Drinkwater with that revolver, and if it went off it was the result of culpable negligence. She had absolutely no right, under any of the facts in this case, to have that revolver in her pocket to be taken out at that time, to take it out and to hammer him with it or to handle it in any such way that it might go off and kill anybody;" and later, in reply to a remark of counsel for defendant, the court said: "Yes, I know that. But I say that where it is absolutely an undisputed fact that the defendant was culpably negligent, and that that was the cause the revolver went off, I won't stultify myself by giving an instruction that would warrant the jury in finding that it was excusable, accidental." Without stopping to consider whether the court was not technically correct in saying that defendant had no right to carry a concealed weapon or to take it out and hammer the deceased with it as she testified she did, we will assume that the remarks had some tendency to prejudice her before the jury. The court emphatically declared that she was culpably negligent. Had the jury found her guilty under sec. 4363, Stats., declaring that "Every other killing of a human being by the act, procurement or *culpable negligence* of another, where such killing is not justifiable nor excusable, . . . shall be deemed manslaughter in the fourth degree," there would be much more room for an argument that the jury were influenced by the court's remarks. But they negatived that crime and found

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her guilty of a higher one, where an imminently dangerous act, evincing a depraved mind regardless of human life, is the chief ingredient. Under our present practice and the beneficent provisions of sec. 3072*m*, it is not alone sufficient to show error to work a reversal, but error of such a character must be shown as to satisfy this court that but for such error a result materially more favorable to the appellant would probably have been reached by the jury. *Hommel v. Badger State Inv. Co.* 166 Wis. 235, 243, 165 N. W. 20, and cases cited. The error must affect a substantial right and we must be satisfied that substantial justice has not been done before we reverse. Here we have a situation where a woman in the presence of two strong, active men, both her friends, in the middle of a village street in the early evening, takes a revolver out of her pocket and begins to hammer the deceased over the arm because he has hold of her by the arm or sleeve and wants her to come into their saloon for the purpose, as she says, of having her get her clothes and go away with her companion. Evidently the jury thought she was in no bodily danger and that she must have known that fact because they negatived self-defense. They also evidently believed that she recklessly and voluntarily fired the gun regardless of the result. Can we say from the evidence that they were not justified in so believing and finding? It seems not. We are satisfied that justice has been done—hence none of the alleged errors should work a reversal. It were better, however, in criminal cases for trial judges to refrain from expressing their views in the presence of the jury as to the probative force of the evidence upon any phase of the alleged guilt of the defendant, and simply rule upon the objections or requests made without comment upon what the evidence shows.

By the Court.—Judgment affirmed.

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STECHER, Plaintiff in error, vs. THE STATE, Defendant in error.

October 11—November 6, 1918.

Criminal law and practice: Obtaining money by false pretenses: Sufficiency of information and of evidence.

1. Acts or conduct may constitute false pretenses.
2. An information following the language of sec. 4423, Stats., and charging defendant with obtaining by false pretenses a power of attorney to mortgage certain land of another person and, by placing a mortgage thereon, designedly and with intent to defraud obtaining money, is *held* sufficient, even as against an objection made before trial,—the false representations, which consisted largely of conduct and a course of dealing rather than oral misrepresentations, being stated as fully as the circumstances would permit, and defendant being fully apprised thereby of the offense with which he was charged.
3. Where such information alleged that the woman who signed the instrument had by the false representations of defendant been led to believe that it was a paper which would assist him in selling the property for her, and that she was induced by his false pretenses and representations to deliver to him a power of attorney to mortgage the land, an allegation in terms that she relied upon the representations was not essential.
4. The evidence in such case (stated in the opinion) is *held* sufficient to sustain a conviction.

ERROR to review a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Affirmed.*

Criminal prosecution for obtaining money under false pretenses. The information alleged that the defendant did unlawfully, designedly, and falsely, and with intent to defraud obtain from Mrs. Anna Remich the power of attorney to mortgage certain property therein described, by falsely representing to Mrs. Remich that he, the defendant, desired to sell said property, and that the said Mrs. Remich, at the request of the defendant, went to the defendant's office and signed an instrument in writing which she had been led to believe by the false representations of said defendant, which she believed to be true, to be a paper which would assist her

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in having the defendant sell her property, when in truth and in fact the said instrument was a power of attorney authorizing the defendant to mortgage or sell Mrs. Remich's property, and that the defendant falsely procured said power of attorney with intent to defraud Mrs. Remich and place a mortgage of $2,000 on said property, and other formal allegations. The defendant pleaded not guilty. Before any testimony was taken the defendant objected to the reception of any evidence under the information for the reason that it did not state a cause of action. The objection was overruled and the trial then proceeded. The case was submitted to the jury, which found the defendant guilty and he was sentenced to three years in the state prison. To review the judgment of the court the defendant sued out a writ of error.

For the plaintiff in error there was a brief by *Kittell, Jaseph & Redfield* of Green Bay, and oral argument by *Lynn D. Jaseph.*

For the defendant in error there was a brief by the *Attorney General, J. E. Messerschmidt,* assistant attorney general, and *William Cook,* district attorney of Brown county, and oral argument by *Mr. Messerschmidt.*

ROSENBERRY, J. The first ground upon which a reversal is claimed is that the information did not charge an offense. It is claimed that the information does not allege what the false representations were; that it is not alleged that the defendant represented the power of attorney to be anything other than it was; and that the information did not allege that Mrs. Remich relied upon the false representations of the defendant.

Under the facts in this case it was very difficult to describe and state with exactitude the representations which were in fact made, for the reason that they consisted largely of conduct and a course of dealing rather than of oral misrepresentations. It appears that the representations were

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stated and described as fully as the circumstances of the case permitted and fully apprised the defendant of the offense with which he was charged and for which he was convicted. While the information does not contain an allegation in terms that Mrs. Remich relied upon the representations made by the defendant, it does allege that she had been led to believe by false representations which she believed to be true that the paper would assist the defendant in selling her property and that she was induced by the false pretenses and representations of the defendant to deliver to him a power of attorney to mortgage, etc. The information follows the language of sec. 4423, Stats., and we think stated an offense and advised the defendant with particularity as to the exact offense which was charged, and is sufficient even upon objection made before trial. *Davis v. State*, 134 Wis. 632, 115 N. W. 150.

It is further claimed that the evidence is not sufficient to support a conviction of the offense charged. It appears that in 1915 the defendant rented rooms in the rear of Mrs. Remich's house, where he lived for about nine months; that he became very well acquainted with Mrs. Remich and that he lived there almost as a member of the family. In May, 1916, in the presence of Mrs. Remich's relatives, he agreed to sell the property upon which the house was located. In August, 1916, he brought purchasers to the house, and Mrs. Remich supposed that this was in connection with the proposed sale. Mrs. Remich was eighty-one years of age and her business for some years past had been transacted mainly by her daughter, Mrs. Manney, with whom she lived. On the day that the purchasers were brought to the house and the power of attorney was signed the defendant knew that Mr. and Mrs. Manney were absent from the city. Mrs. Remich went to the defendant's office to sign the power of attorney, and while there she was asked by an employee of the defendant if she knew what she was signing and she said she did, but she did not attempt to state what the nature

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of the instrument was. The power of attorney was signed on August 2d, and it was not until nine months later that she learned that a mortgage had been placed upon her property for $2,000, and she then discovered for the first time the existence of the power of attorney in question. She had a policy of fire insurance upon the property, but the defendant did not ask her to transfer this, but caused new policies of insurance to be issued. Mrs. Remich claimed that at the time the appraisal was made the defendant told her the property was appraised for $5,000, but that he was going to sell it for $5,500. He did not make any statements to her as to the contents of the document and denied the material facts testified to by Mrs. Remich, but his conduct and the whole course of the transactions between Mrs. Remich and the defendant were such as to induce her to believe and suppose that instead of signing a power of attorney to mortgage the home she was signing papers which had to do with its sale. The fact that the defendant on the 4th day of August mortgaged the property under the power of attorney; that he had never advised Mrs. Remich of that fact; that although in business with Mr. Manney, her son-in-law, he never disclosed to him the fact of procuring the power of attorney; and that he used the proceeds of the mortgage for his own purposes, sufficiently characterizes the transaction so far as the defendant is concerned. Acts or conduct may constitute false pretenses. 11 Ruling Case Law, 838, footnote and cases cited.

The case presents some rather unusual features. The false representations made were rather meager, but it is undisputed that they were sufficient to deceive Mrs. Remich, and upon the whole case the jury were satisfied beyond a reasonable doubt as to the guilt of the defendant, and we see no reason, after carefully considering the evidence, why the judgment should be disturbed.

By the Court.—Judgment affirmed.

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HOLDGRAFER, Appellant, vs. TOWN OF BENTON, Respondent.

October 9—December 3, 1918.

Bridges and culverts: Repairs: Strength.

In sec. 1322*m*, Stats. 1917, the words "no such bridge or culvert" refer to the kind of bridge or culvert theretofore mentioned in the section; hence, every "iron, steel or concrete bridge or culvert of more than four feet in length of span" must, when repairs are made thereon, be left strong enough to sustain a load of fifteen tons. ESCHWEILER and KERWIN, JJ., dissent.

APPEAL from an order of the circuit court for La Fayette county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to recover damages for injuries sustained on a highway of defendant town caused by a thirteen-ton tractor falling through an iron and steel bridge fifty-two feet long constructed prior to July 12, 1911, but repaired subsequent thereto. The defendant demurred to the complaint, which alleged these and other appropriate facts. From an order sustaining the demurrer the plaintiff appealed.

The cause was submitted for the appellant on the brief of *J. W. Murphy* of Platteville and *J. D. Dunwiddie* of Monroe, and for the respondent on that of *S. E. Smalley* of Cuba City and *Orton, Osborn & McDaniel* of Darlington.

VINJE, J. The circuit court sustained the demurrer to the complaint, holding that under the provisions of sec. 1322*m*, Stats. 1917, no duty devolved upon the town to repair the bridge in question so that it would sustain a weight of more than ten tons. The correctness of this ruling is challenged by the appellant. Sec. 1322*m* provides:

"From and after the passage and publication of this act, no iron, steel or concrete bridge or culvert of more than four feet in length of span shall be constructed in any highway in this state unless it shall be designed, according to standard engineering practice, to have sufficient strength to carry, without planking, any load that may be driven or propelled upon, on or along such bridge or culvert, of not more than

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fifteen tons, and no such bridge or culvert shall be repaired unless such repairs shall leave such bridge or culvert in such condition that it shall have sufficient strength, according to standard engineering practice, to carry, without planking, any load that may be driven or propelled upon, on or along such bridge or culvert, of not more than fifteen tons."

Previous to the passage of ch. 642, Laws 1911, now the section quoted, which took effect July 12, 1911, bridges of the class in question were not required to sustain a weight of more than ten tons. It is a matter of common knowledge that the weight of loads on country highways has of late years steadily increased. We have heavier threshing machines, engines, and tractors; and auto drays carrying heavy loads are in use as well as heavy road machinery of various kinds. Owing to such increase in the weight of loads the legislature made provision for stronger bridges, first, by construction, and second, by repair. It is clear that every bridge of the class mentioned in the section, to wit, every "iron, steel or concrete bridge or culvert of more than four feet in length of span," constructed after July 11, 1911, must be so constructed as to maintain a weight of fifteen tons or more. The law then says that "no such bridge or culvert shall be repaired unless such repairs shall leave such bridge or culvert in such condition that" it shall sustain a weight of fifteen tons. The word "such" is an adjective and relates to the kind of bridge or culvert mentioned in the first sentence and not to the time of its construction. The words "no such bridge or culvert" take the place of the words "no iron, steel or concrete bridge or culvert of more than four feet in length of span." So that it is just the same as if the law read, "from and after the passage and publication of this act no iron, steel, or concrete bridge or culvert of more than four feet in length of span shall be repaired," etc. If the provision as to repairs related only to bridges of the class mentioned which are constructed after the passage of the act it would be superfluous, for a bridge required to be constructed to sustain a weight of fifteen tons must, *ipso facto*,

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be kept in repair to sustain that weight. No additional provision is necessary to declare that duty. The legislative intent was to make all new bridges of the required kind sustain fifteen tons and to bring old bridges of the required kind into the fifteen-ton class when they were repaired. In this way, and only in this way, could the legislature without too much expense to municipalities gradually and within a reasonable time bring all bridges into the fifteen-ton class. A contrary construction would permit all bridges built prior to 1911 to remain indefinitely in the ten-ton class, and highways would continue indefinitely to be inadequate to sustain modern loads. It is evident, therefore, that the circuit court erred in its construction of the statutes.

By the Court.—Order reversed, and cause remanded with directions to overrule the demurrer, and for further proceedings according to law.

ESCHWEILER, J. *(dissenting).* The adjective "such," in the phrase "and no *such* bridge or culvert shall be repaired unless such repairs shall leave such bridge or culvert in . . . condition . . . to carry . . . any load . . . of not more than fifteen tons," can, without violating any rules of grammar or logic, be held to only refer to the bridges or culverts of iron, steel, or concrete which are constructed subsequent to the passage of ch. 642, Laws 1911, and therefore only to those of fifteen tons original capacity.

The primary subject matter of this chapter, creating as it does new statutes and not merely amendments of the old, is to provide by express language a new standard of a carrying capacity of fifteen tons for bridges thereafter constructed of iron, steel, or concrete. It manifestly creates a new condition or requirement, to be considered and met when the electors vote upon the questions relating to the construction of new bridges and the issuance of bonds therefor, or when the proper officers of such municipalities must perform duties required of them as to such construction.

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It is expressly aimed at the bridge of the future and not at that of the past, and all its provisions can be construed in harmony with that primary object and should not, as is done by the majority opinion, be held to the future by the express, and then to the past by the implied, language. If the legislature had intended the result reached by the majority opinion, that all iron, steel, or concrete bridges of over four feet span theretofore erected but of ten-ton carrying capacity should also, upon the happening of such a contingency as the needing of repairs, be then and thereupon transformed into bridges or culverts of a capacity of one and one-half times their original construction, how easy it would have been to insert in the new statutes, created in lieu of the above quoted portion of sec. 1322*m*, a provision in substance, "and no iron, steel, or concrete bridge hereafter or heretofore constructed shall," etc. *Milwaukee v. Ritzow*, 158 Wis. 376, 149 N. W. 480. I prefer to acquit the legislature of any such paucity of expression or of preferring the occult to the direct method of legislation.

That the intent was to couple the idea of repair with only such new bridges of fifteen tons original capacity is further strengthened by a consideration of the language of sec. 1322*o* as created by the same chapter, and which fixes a liability upon owners of traction engines for all damages caused to a bridge or culvert by the driving of a load in excess of fifteen tons "upon or along any bridge or culvert *constructed* in compliance with section 1322*m* of the statutes, or *constructed and repaired* in compliance with said section."

No provision can be found in this section for any such liability when driving such a vehicle of excess weight upon the kind of bridges now read into sec. 1322*m* by the majority opinion, namely, bridges of ten tons capacity required to be repaired or rebuilt of fifteen tons capacity, for such bridges are neither "constructed" nor "constructed and repaired" in compliance with sec. 1322*m*.

There may well have been within the legislative mind, at

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the time it expressed its intent by the passage of this chapter in 1911, knowledge of the fact that an iron or steel bridge built to comply with the then requirements of ten tons carrying capacity could not, owing to the necessary changes in at least the floor construction, be changed to one of fifteen tons capacity except by practically rebuilding the entire structure and at probably a cost nearly equal to that of an entirely new bridge. In effect, then, as far at least as steel or iron bridges are concerned, the construction given by the majority opinion to the word "repair" makes it equivalent to "rebuild" or "remodel." The substantial difference there is between the terms "repair" and "remodel" is pointed out in the very recent case of *Cotter v. Joint School Dist.* 164 Wis. 13, 158 N. W. 80. The practical effect of the majority opinion herein will be to make the terms identical.

I do not think the legislature meant to alter the position, as lawful structures, of the then constructed iron, steel, and concrete bridges, any more than it did as to the then constructed wooden bridges, and that the use of the word "repair," as above quoted, simply meant that when such new fifteen-ton bridge was once constructed it should not be permitted, from lack of repairs, to become of a lessened capacity.

From the third biennial report of the Wisconsin Highway Commission, December, 1916, on page 22, it appears that there was not at that time even, five years after the passage of this act, any definite knowledge as to the number of bridges existing in this state. Their estimate, however, in 1916, is of a total of 32,000 bridges of over six feet span, including wooden bridges. As construed by the majority opinion, the moment any one of the bridges constructed before 1911 of iron, steel, or concrete needs repairs—and that might mean no more than the replacing of a broken plank or the mending of a railing,—such old bridge must from that moment be transformed to a fifteen-ton bridge, no matter how substantial the original structure may have been as a ten-ton bridge, no matter how trifling may be the expense of

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the necessary repairs or how excessive and burdensome the expense of reconstructing the same.

By the same report of the highway commission and on the same page it appears that the average cost of construction of bridges as planned and supervised by the commission is now about $38 per lineal foot. The same report suggests that there should be rebuilt, for the sake of safety and for economy in maintenance, about 28,000 of such old bridges, including wooden, and at an estimated cost of $32,000,000. The significance of these figures here lies in the fact that the commission suggests that these changes should be made within the twenty years following their report in 1916. The practical effect of the majority opinion herein will undoubtedly throw a large portion of that $32,000,000 upon the immediate future.

The further difficulties that the construction by the majority opinion of this chapter is going to present to the municipalities chargeable with the building of such structures are very apparent upon a consideration of the statutory proceedings preliminary to bridge construction and necessary to be taken under ch. 52, Stats., "Highways and Bridges," particularly where such bridges are within one or more towns or across navigable streams; the various provisions for voting by the electors of the municipalities interested and for the giving of bonds, and the various limits placed upon the powers of such municipalities and their officers as to the repairing of such bridges in excess of a certain specified amount; and the uncertainties and confusion that must surely result in determining whether such enforced transformation of bridges from ten to fifteen-ton capacity is now under the majority opinion herein within the statutory provisions as to repairs of bridges or of the rebuilding of bridges.

I am authorized to state that Justice KERWIN concurs in this dissent.

OWEN, J., took no part.

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CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY, Respondent, vs. PETERSON and others, Appellants.

November 6—December 3, 1918.

Carriers: Interstate commerce: Liability of consignor for freight charges: Bill of lading: Delivery: Waiver of lien: Custom and usage.

1. Upon an interstate shipment of merchandise the consignor is primarily liable for the freight charges, although the bill of lading provides that "the owner or consignee shall pay [such charges] and, if required, shall pay the same before delivery;" and failure of the carrier to collect the charges from the consignee, even though the lien therefor on the goods is thereby lost, is no defense against such liability of the consignor.
2. No alleged custom or usage as to a certain commodity, that the carrier should, before delivery thereof, collect the freight charges from the person presenting the bill of lading at the point of destination, can be shown to alter the relations between shipper and carrier under the laws and rules regulating interstate commerce, or to create a preference in favor of the shippers of that particular commodity.

APPEAL from an order of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Affirmed.*

From the pleadings it appears that the defendants, copartners engaged in the produce business, shipped two carloads of potatoes from Waupaca county in this state to Indianapolis, Indiana, and were sued by plaintiff, a common carrier, for the freight charges.

The defendants as consignors made themselves consignees, with directions to the plaintiff to notify a prospective customer by the name of Wilkerson at Indianapolis.

In each of the bills of lading was a provision that the charges were guaranteed by the shipper and a further clause as follows: "Section 8. The owner or consignee shall pay the freight and all other legal charges accruing on said property, and, if required, shall pay the same before delivery. . . ."

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Defendants drew a draft on Wilkerson for each shipment at the invoice price *less freight charges,* attached the drafts to the respective bills of lading, sent them to a bank in Indianapolis, where they were received and paid for by Wilkerson or someone to whom he had sold the potatoes, and upon presentation of the bill of lading to the plaintiff the potatoes were delivered without requiring the prepayment of the freight charges. The defendants interposed, by way of defense to their otherwise admitted liability, their claim that the plaintiff through its own negligence failed to collect the freight charges from the person to whom the potatoes were so delivered at the time of the delivery, and that such failure was in violation of what was claimed to be a long established custom or usage among shippers of potatoes and railroad companies that the railroad companies should collect their freight charges from the person presenting the bill of lading at the point of destination and before delivery.

The trial court sustained the plaintiff's demurrer to such alleged defense, and from the order sustaining such demurrer the defendants appeal.

John C. Hart of Waupaca, for the appellants.

For the respondent there was a brief by *Browne, Browne & Smith* of Waupaca, attorneys, and *C. C. Hine* of Chicago, of counsel, and oral argument by *L. D. Smith.*

ESCHWEILER, J. In interstate shipments of merchandise upon such bills of lading as were issued in this case the consignor is primarily liable for the freight charges, and the failure on the part of the common carrier to collect the freight charges from the consignee under the provisions of section 8 of the bill of lading, set forth in the statement of facts, even though thereby it loses its lien on the freight for such charges, is no defense. *Great Northern R. Co. v. Hocking Valley F. C. Co.* 166 Wis. 465, 166 N. W. 41.

The effect of the alleged custom or usage would be to substantially vary the express language of the bill of lading

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itself by making the person to whom the shipment was delivered, instead of the shipper, primarily liable, and because it would have such a contradictory effect proof of such alleged custom cannot properly be allowed. *Mowatt v. Wilkinson,* 110 Wis. 176, 85 N. W. 661; *Francis H. Leggett & Co. v. West Salem C. Co.* 155 Wis. 462, 471, 144 N. W. 969; *State ex rel. News Pub. Co. v. Park,* 166 Wis. 386, 390, 165 N. W. 289; *Furness, Withy & Co. v. Randall,* 124 Md. 101, 91 Atl. 797, 800; *Portland F. M. Co. v. British & F. M. Ins. Co.* 130 Fed. 860.

The relations between common carriers and shippers are no longer mere matters of contract, but are fixed by the laws and rules regulating such interstate commerce and partake of the nature of statutory obligations. *Armour P. Co. v. U. S.* 209 U. S. 56, 82, 28 Sup. Ct. 428; *New York, N. H. & H. R. Co. v. York & Whitney Co.* 215 Mass. 36, 40, 102 N. E. 366.

To give this alleged custom, therefore, the effect asked for by the defendants in this case would be to place them as shippers in a different and necessarily more favored position than other merchandise shippers in the same locality in whose favor no such custom existed. There can be no such preferences lawfully given or created by any agreements between carriers and shippers under the interstate commerce law. *Atchison, T. & S. F. R. Co. v. F. H. Stannard & Co.* 99 Kan. 720, 162 Pac. 1176; *Wells Fargo & Co. v. Cuneo,* 241 Fed. 727.

The ruling of the court below in sustaining the demurrer to such defense was correct.

By the Court.—Order affirmed.

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WALTERS, Respondent, vs. SENTINEL COMPANY, Appellant.

November 6—December 3, 1918.

Libel: Newspaper article: Construction: Reflection upon plaintiff in professional and official capacities: Conditional privilege: Malice: Evidence: Harmless error: Excessive damages.

1. In an action for libel the jury is *held* to have been justified in finding that the newspaper article in question falsely charged, in effect, that plaintiff had committed the crime of assault and battery, that he had not obtained a proper medical education, training, or diploma and that he was a quack doctor practicing as such, and that he was performing his duties as mayor of a city in a ridiculous, foolish, and silly manner and was a subject of ridicule and contempt.
2. So far as such article constituted a reflection upon the plaintiff in his professional capacity or accused him of crime it was libelous *per se*.
3. The gratuitous and unjust reference to plaintiff's professional qualifications and the insinuation that he had committed an assault and battery were not germane to a discussion of his official conduct as mayor and were not privileged.
4. A newspaper article which pictured the mayor of a city as performing his duties in a ridiculous, foolish, and silly manner and as a subject of ridicule and contempt, and which, taken as a whole, was not a fair comment upon him in his official capacity, was not conditionally privileged, even though published without malice.
5. Where a newspaper published primarily for a given constituency, such as county or state, church or lodge, has a small circulation outside of such constituency, it is not deprived of its privilege in the discussion of matters of concern to its constituency because of such incidental outside circulation.
6. But where a newspaper published in one city circulates throughout the state and extensively outside of the state, it is not privileged in the discussion of the official conduct of an officer of another city in which its circulation is but an insignificant proportion of the whole, the great bulk of its readers having no direct or legitimate interest in such conduct.
7. In an action against a newspaper publisher for libel, articles other than the one in question, which appeared in such paper, concerning the plaintiff, are admissible as bearing upon the question of express malice.

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8. In an action for libel the admission of testimony bearing only upon the question of express malice was, if error, not prejudicial to defendant, where the jury found that there was no express malice in the publication.
9. An award of $1,800 (reduced by the court from $4,000) as damages for publication of a libelous newspaper article constituting a serious reflection upon the plaintiff in his professional and official capacities, is *held* not excessive.

APPEAL from a judgment of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Action for libel. The plaintiff was a physician by profession, and at the time of the publication of the article upon which this action is based was mayor of the city of Stevens Point. The following is the article:

"MAYOR GOES 'THE LIMIT' IN CLEANUP.

"Stevens Point Cowboy Executive in Lone-handed Reform.

"MAKES RAID ALONE.

"Dashes in Taxi to Hotel, Arrests Four for 'Shooting Craps.'

"FIGHTS OLD MAN.

"Sustains Kicked Shins from City Controller, Aged 65.

"Stevens Point, Wis., Nov. 20.—(Special).—*F. A. Walters,* Stevens Point's doctor-cowboy-lecturer-mayor, is 'going the limit—perhaps beyond the limit,' to clean up his city. He said so Monday morning.

"Already he has gone a long way toward 'the limit.' He has gone as far as participating in raids on alleged gambling joints and alleged illegally operated saloons, employing detectives from out of town, threatening suits against the newspapers of the city, personally arresting two men in a hotel, and openly stating his intention of obtaining dismissal of the chief of police.

"*Mayor Walters's* home was in Fond du Lac. Then he went out west and was a cowboy. When he came back it

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was as a homeopathic doctor, but he retained, like Chicago's wild and woolly mayor, traces of his rough-and-ready career on the cattle ranges in the form of a sombrero and other 'trimmings.' For twenty-five years he lived here and at Wausau, Wisconsin. Then four years ago he was elected mayor. After three years in that office he was defeated for re-election by L. P. Pasternacki, Polish dentist. At the last election *Mr. Walters* was candidate again and was elected for his fourth term.

"ADOPTS DRASTIC PROGRAM.

"Then he started his trip toward 'the limit.'

" 'The townspeople insinuated that things weren't run the way they ought to have been run when I was mayor before,' he said. 'So now I'll show them that I can run things strictly.

" 'We've got the cleanest little city in the state. But there are a few gamblers and sports here who have been living on the community for years. It's time for them to go.'

"So, shortly after his inauguration, he issued warning that gambling ordinances and the Sunday-closing law would be enforced to the letter. He started with the automobile tail light and the traffic laws.

"Presently, detectives appeared in Stevens Point. Then one Sunday morning the mayor personally assisted in raiding an alleged gambling resort over a saloon. Four men were arrested. One of them, 'Candy Pete' Mosel, was charged with running a gambling house, and another, Tom Leonard, with being a gambler. Next *Mayor Walters* and his purity squad raided the premises of the tailoring shop of Walter Glinski and arrested John Kutella on the charge of selling liquor on Sunday. The mayor's evidence sought to establish that there was a 'posted men's club' in the city through which the men on the blacklist were furnished with liquor.

"WOMEN INDORSE HIM.

"About this time the mayor began to reap the rewards of the reformer. The Stevens Point Women's Club and a massmeeting of 300 citizens in the Baptist Church passed resolutions indorsing him.

"But opposition developed also. The mayor criticised Chief of Police John S. Hofsoos and tried to obtain dis-

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missal of Patrolman Jadd Chenevert. But the police and fire commission refused to back him up.

"He charged that a new $20,000 sewer project was not being inspected properly by the board of public works. When the board of public works resented this criticism, the city council abolished the board and put its work into the hands of a committee of its own members. The board of public works, however, had friends; one of them was George Rogers, sixty-five years old, city controller and former mayor. The mayor became involved in an altercation with the aged official. They clinched. The cowboy mayor had Mr. Rogers by the chin and arm, and Mr. Rogers had scored several kicks upon the mayor's shins. Then the rest of the city administration separated the antagonists.

"POLITICIANS LINE UP.

"Some time later a committee of citizens waited upon Dr. Pasternacki, *Mayor Walters's* predecessor, and asked him if he would be candidate for mayor at the next election. Both the Stevens Point Daily Journal and the Weekly Gazette published this news, omitting the names of the committee. Whereupon the publishers were visited by Attorney A. L. Smongeski, who said that unless they divulged the names of the committeemen they would be sued for libel. Saturday night was their last hour of grace, but by 10 o'clock Monday morning no papers had been served on the publishers.

"Meanwhile the chief of police had caught the reform fever and had caused two arrests. The mayor appeared in court asking the dismissal of both actions, stating that one of the saloonkeepers, Winn Cowelsok, had kept open late to furnish liquor to a sick man, and that the other liquor dealer, John Lukaszewicz, had kept his place open because he was compelled to by four customers. The cases were dismissed.

"MAKES DRAMATIC RAID.

"Friday afternoon *Mayor Walters* received a tip that gambling was going on in the Soo Hotel on the south side of the city. He leaped into a taxicab, sped southward, dashed into the barroom, whipped out his trusty revolver, and arrested four men. He charged them with shooting craps. They were arraigned on Saturday, but the case was dismissed for insufficient evidence.

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"On Monday morning Stevens Point was prepared to watch the trial of Leo Boyanowski, charged with being keeper of a gambling joint. The outcome of the trial will determine the result of one of the mayor's raids. The other cases will follow.

"But besides that, Stevens Point was prepared for almost anything. The mayor has promised that within a week or ten days he will have new evidence pertaining to the dismissal of Chief of Police Hofsoos. And, furthermore, he has promised that he 'will go the limit—perhaps beyond the limit.'"

The jury returned the following special verdict: (1) that a person of average comprehension, upon reading the article, would have understood that it was therein stated and charged that the plaintiff attacked and assaulted Mr. Rogers; (2) that such statement and charge was, in substance, not true; (3) that a person of average comprehension, upon reading the article, would have understood that it was therein stated and charged that the plaintiff, *Dr. Walters,* had not obtained a proper medical education, training, or diploma and that he was a quack doctor practicing as such; (4) that a person of average comprehension, upon reading the article, would have understood that it was therein stated and charged that the plaintiff was performing his duties of mayor of said city of Stevens Point in a ridiculous, foolish, and silly manner and was a subject of ridicule and contempt; (5) that said statements and charges were, in substance, not true; (6) that the article published, taken as a whole, was not a fair comment on the acts of the plaintiff in his capacity as mayor of the city of Stevens Point; (7) that the defendant was not actuated by express malice in causing said article to be published; and (8) damages $4,000.

The court granted the plaintiff judgment upon the verdict on condition that he remit all damages in excess of $1,800, which condition was met by the plaintiff, and judgment was, accordingly, entered against defendant for $1,800. From the judgment so entered the defendant appealed.

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For the appellant there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Louis Quarles.*

For the respondent there was a brief by *A. L. Smongeski* of Stevens Point, attorney, and *Bouck, Hilton, Kluwin & Dempsey* of Oshkosh, of counsel, and oral argument by *John F. Kluwin.*

OWEN, J. By its verdict the jury found that the article in question falsely represented, in effect, that the plaintiff had (a) committed the crime of assault and battery; (b) that he had not obtained a proper medical education, training, or diploma and that he was a quack doctor practicing as such; and (c) that he was performing his duties as mayor of Stevens Point in a ridiculous, foolish, and silly manner and was a subject of ridicule and contempt.

The defendant contended that the article was not subject to such construction. The jury found that it was, the trial court expressed his approval of the findings, and we are of the opinion that the article is more than susceptible to such construction. The contention of the defendant that the article was justified in such respects by the facts is also negatived by the jury upon abundant proof. It is needless for us to say that so far as the article constitutes a reflection upon the plaintiff in his professional capacity, or accuses him of crime, it is libelous *per se* and, as seen, all available defenses thereto were repudiated by the jury.

The defendant urges that the circumstances gave rise to an occasion of conditional privilege, because the plaintiff is a public officer, and the article deals with his official acts. While it is true that plain speaking and severe and caustic comment may be indulged concerning the acts of a public officer, his election to office does not bare him to the shafts of falsehood and slander. His good name and his reputation in his profession and as a law-abiding citizen are protected after as well as before he took the oath of office. Conceding that the gist of the article deals with plaintiff's offi-

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cial acts as mayor of Stevens Point, the gratuitous and unjust reference to his professional qualifications, and the insinuations that he assaulted an old man, were not germane to a discussion of his official conduct and are in no sense privileged. These were matters extraneous and unrelated to a discussion of his official conduct, evidently imported into the article in harmony with a general purpose to belittle and ridicule the plaintiff. The mere fact that the plaintiff held the office of mayor did not make him the defenseless subject of such defamations.

Is the article, so far as it relates specifically to plaintiff's official conduct, privileged? The jury found that a person of average comprehension, on reading the article, would have understood that it was therein stated and charged that plaintiff was performing his duties as mayor of Stevens Point in a ridiculous, foolish, and silly manner and was a subject of ridicule and contempt; that the article was not a fair comment on the acts of the plaintiff in such capacity; and that the defendant was not actuated by express malice in causing said article to be published. In some jurisdictions it is held that all matters, true or false, having a bearing on the fitness of a public officer or candidate for public office may be published, without liability, if it be shown that they were published without malice, in good faith, and in the honest belief that the facts stated were true. 17 Ruling Case Law, pp. 354, 355; *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. N. S. 361. Here the immunity is not so sweeping. While the citizen may speak plainly, indulge in extravagant expressions and caustic and severe comments, if the facts warrant, concerning the fitness, qualifications, and official conduct of men in whom he is interested as a citizen, he cannot do so in disregard of the facts. He cannot malign, falsify, insult, or hold up to public hatred, contempt, or ridicule unless his statements be warranted by the facts. *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111; *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403;

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Arnold v. Ingram, 51 Wis. 438, 138 N. W. 111; *Williams v. Hicks P. Co.* 159 Wis. 90, 150 N. W. 183; *Leuch v. Berger,* 161 Wis. 564, 155 N. W. 148; *Putnam v. Browne,* 162 Wis. 524, 155 N. W. 910. The jury having found that the article pictured the plaintiff as performing his duties as mayor in a ridiculous, foolish, and silly manner and as a subject of ridicule and contempt, and that the article, taken as a whole, was not a fair comment upon him in his official capacity, it is not the subject of conditional privilege, even though published without malice.

There is another reason why the article is not privileged. The Milwaukee Sentinel, in which the article appeared, is a metropolitan daily newspaper published in the city of Milwaukee and circulates not only throughout the state of Wisconsin but extensively outside of the state. An insignificant proportion of its circulation is within the city of Stevens Point, the only place where its readers had a legitimate interest in the official conduct of the mayor of that city. While this court has held that a county newspaper is privileged to discuss the qualifications of a candidate for county office, even though it has an incidental circulation outside of the county (*Arnold v. Ingram, supra; Putnam v. Browne, supra*), and the same rule would apply of course to county officers, a different situation is presented where a metropolitan paper with a state-wide circulation discusses the official conduct of an officer of a municipality other than that in which the paper is published. This is especially true where an inconsequential proportion of its circulation is in such municipality. In such cases the great bulk of its readers have no direct or legitimate interest in the public conduct of the officer whose record is under discussion, and this is one of the fundamental principles upon which the doctrine of privilege rests. The general rule deducible from the authorities may be stated to be: If a newspaper, published primarily for a given constituency, such as county or state, church or lodge, have a small circulation outside such con-

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stituency, it is not deprived of its privilege in the discussion of matters of concern to its constituency because of such incidental outside circulation. *Mertens v. Bee Pub. Co.* 5 Neb. (Unof.) 592, 99 N. W. 847; *Redgate v. Roush,* 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236; *Shurtleff v. Stevens,* 51 Vt. 501, 31 Am. Rep. 698; *Hatch v. Lane,* 105 Mass. 394; *Coleman v. MacLennan,* 78 Kan. 711, 98 Pac. 281. For this additional reason the article was not conditionally privileged.

Defendant complains because the court admitted in evidence articles concerning plaintiff appearing in other issues of the Milwaukee Sentinel. The question of the express malice of the defendant was in issue at the trial. It is well settled that statements made by a defendant in an action for libel or slander at other times and upon other occasions are admissible as bearing upon the question of express malice. *Born v. Rosenow,* 84 Wis. 620, 54 N. W. 1089; *Earley v. Winn,* 129 Wis. 291, 109 N. W. 633; *State ex rel. Mengel v. Steber,* 154 Wis. 505, 143 N. W. 156. There was no error in the admission of the articles mentioned.

During the trial defendant called a witness who testified that the two men arrested at the time of the raid on the Soo Hotel, mentioned in the article, were discharged by the court upon their trial and that it was rumored in Stevens Point that the Soo Hotel affair was a frame-up to fool the mayor. The court then permitted the plaintiff to prove that these two men were acquitted as a result of perjured testimony, and that two witnesses who testified in that action on their behalf were subsequently convicted of perjury because of their testimony given in that case. Defendant assigns this as error. We do not see that any of this testimony was very material. If material at all, it was upon the question of express malice and as tending to show the good faith of the defendant in the publication of the article. The jury found in favor of the defendant on the question of malice, and as the testimony upon this subject, that of the plaintiff as well

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as that of the defendant, could be material upon no other question, it seems clear that the defendant was not prejudiced by its admission.

The defendant further claims that the verdict, even as reduced by the court, is excessive. We do not think so. The article constituted a serious reflection upon the plaintiff in his professional and official capacities. The jury was warranted in assessing substantial damages. We regard $1,800, the amount to which the verdict was reduced by the court, as conservative.

By the Court.—Judgment affirmed.

O'LOUGHLIN, Appellant, vs. DORN and others, Respondents.

November 6—December 3, 1918.

Schools and school districts: Building of schoolhouse: Cost in excess of fund provided: Repudiation of obligation: Judgment restraining tax levy: Construction and effect: Ratification of acts of school board.

1. Where the sum of $450 was claimed to be due as a balance on a contract for the building of a schoolhouse, a motion, carried at an annual meeting of the school district, "that if we can get out of paying the $450 to [the contractor] we will" was not effectual either as a repudiation of the obligation or as a bar to a later recognition thereof.
2. Where the trial court found that, after a school district had in 1912 adopted a resolution to raise a certain sum for the purpose of paying the balance of the cost of building a schoolhouse, a judgment was entered in the circuit court "restraining the levy of said tax for the reason that it exceeded the amount which could be raised by a tax levy in one year by said district," and said judgment, but no other part of the record in the action in which it was rendered, is in the bill of exceptions upon an appeal in the case in which such finding was made, that finding is conclusive upon this court as to what was determined by said judgment, especially where no exception was taken to the finding.
3. The judgment so found to have been entered could not affect the validity of proceedings based upon formal action taken by the school district in 1915 to approve and ratify the acts of the school board in procuring the erection of the school-

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house and to authorize the borrowing of money, payable in four annual instalments, to pay the balance of the cost thereof—the action taken in 1915 not being a revival or renewal of the proceedings had in 1912, and hence not a violation of any order restraining the levy of a tax in 1912.

4. Where a school district provided a fund of $1,700 only for the building of a schoolhouse, the school board had no authority or power to bind the district in excess of that amount; but after the board had, without authority, procured the erection of the building at a larger cost, the district, which might in the first instance have provided a fund equal to said cost, could lawfully accept the building and ratify and confirm the acts of the board, and thus create an obligation of the district to pay the larger amount. *Balch v. Beach*, 119 Wis. 77, and *Glidden State Bank v. School Dist.* 143 Wis. 617, distinguished.

APPEAL from a judgment of the circuit court for Buffalo county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Plaintiff, as resident, voter, and taxpayer of the school district of the town of Glencoe, Buffalo county, brought this action in equity on behalf of others in said district as well as himself to enjoin the officers of that school district from in any manner paying certain notes of said school district or raising any tax or making any loan for such purpose.

At the annual meeting of the school district on July 3, 1911, resolutions were adopted to build a new schoolhouse, brick veneered, size 36 x 24, to have furnace heat, and with privilege of making larger; and that the board borrow $1,700 from the state trust fund.

At a special meeting on August 24th more formal resolutions were adopted for the making of the $1,700 loan; purchasing the site; raising by tax a sum sufficient to pay the principal and interest on such loan; to dispose of the old school; and authorizing and directing the school board to proceed with the construction of the new schoolhouse.

In September, 1911, a contract was entered into between the school board and one J. G. Schneider for the construction of a new schoolhouse at the price of $2,238. The building

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was completed early in 1912 and used from that time on by the district for school purposes. The $1,700 borrowed from the state trust fund was paid to the contractor as well as $100 received on the sale of the old building, and on May 7, 1912, a note for $450, which seems to have been an agreed balance due on the contract, was executed on behalf of the school district by its officers with their individual guaranties and delivered to said J. G. Schneider, who sold the same to the *Bank of Arcadia*. No meeting of the school district or of the school board was held to authorize the giving of this note. The note was renewed from time to time thereafter by the then town officers, the renewal notes all to the *Bank of Arcadia* adding the accrued interest to the principal, so that at the time of the commencement of this action the amount of the principal and interest was $532.49.

At the annual meeting in July, 1912, the only reference to this matter was as follows: "Motion made and carried that if we can get out of paying the $450 to J. G. Schneider we will."

At a special meeting of the district August 24, 1912, a resolution was duly carried that there be raised $477 for the purpose of paying the balance of the cost of the construction of the schoolhouse. At the annual meeting in July, 1913, a resolution was adopted that "said school building be accepted by the district at the contract price of $2,150 and all the acts of said school board be hereby ratified and accepted." And also "that we raise by tax $470.25; during the year 1913 $150, during the year 1914 $175, and during 1915 $206.21."

At the meeting on June 7, 1915, designated by the findings and so treated by the parties as the annual meeting, there was adopted by 21 to 6 votes, expressed by written ballots, a formal resolution reciting the holding of the special meeting of August 24, 1911; the voting to build a new schoolhouse; that the school board proceed to build at a cost of $2,250; the raising of the $1,700 from the school trust fund, and the sale of the old schoolhouse for $100; the paying of

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the sum of $1,800 on the cost of its construction; the leaving of a balance of $450 due thereon "at the time of the completion and acceptance of said building, to wit, February 7, 1912;" that said balance of $450 with interest amounts to $532.49, which is still unpaid by said district; that the schoolhouse has been used as such since its erection and the school district has accepted the same; that the school board acted in good faith and for the sole purpose of carrying out the intention and wishes of the qualified electors of said school district as expressed August 24, 1911; that the school district has had the use and benefit of said building and it has been satisfactory; that said school building be accepted by said school district at the contract price thereof and all the acts of said school board be hereby ratified, approved, and accepted; that the school district board be authorized to borrow $532.49, payable in four annual instalments (specifying amounts and dates), with interest, for the purpose of paying the balance of the cost of building said schoolhouse; and lastly, that a sum sufficient to pay the interest and principal of said loan as it becomes due be and the same hereby is levied upon the taxable property of said district.

On June 8th the school district officers met and borrowed $532.49 from the *Bank of Arcadia* and executed notes therefor in amounts and dates corresponding with the provisions made at the meeting of the day before. These notes were taken by the bank in lieu of the last renewal note for the first one of May 7, 1912.

After the trial the court made findings determining the facts as stated above, and also a finding numbered (9) which is copied hereafter in the opinion; and further that the electors of the school district had full knowledge of the actions of the board at all times, and that with such knowledge they duly ratified, confirmed, and approved of such acts.

As conclusions of law it was found that the notes of June 8, 1915, are valid and subsisting obligations against said district and that the tax provided in said resolution is

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valid and effective, and that plaintiff's complaint be dismissed on the merits. From a judgment entered thereon plaintiff has appealed.

The cause was submitted for the appellant on the brief of *Frank C. Richmond* of Arcadia and *R. S. Cowie* of Whitehall, and for the respondents on that of *Gaveney & Barlow* of Arcadia and *Edward Lees* of Winona, Minnesota.

ESCHWEILER, J. The carrying of the motion at the annual meeting in July, 1912, in the words "that if we can get out of paying the $450 to J. G. Schneider we will," cannot be held such a definite, formal proceeding on the part of the electors of the school district as would amount to a repudiation of the obligation claimed to be due as a balance on the contract for the building of the schoolhouse, as is urged by appellant. However devoutly those then present may have wished for such a consummation, they fell short in any fulfilment thereof, and their declaration, therefore, was ineffectual either as a repudiation of the obligation or as a bar to a later recognition thereof.

Appellant also alleges that the judgment which is described by the ninth finding of fact as follows: "That thereafter an action was commenced by one L. F. Kurth to restrain the levy of said tax of $477, and on the 7th day of February, 1913, a judgment was rendered and entered in the circuit court for Buffalo county restraining the levy of said tax for the reason that it exceeded the amount which could be raised by a tax levy in one year by said district," is binding upon defendants and conclusive in favor of plaintiff upon the facts here involved.

There is no dispute but that the sum referred to in that Kurth action was intended to be used to extinguish the same obligation which is the subject matter of this action, namely, the balance of $450 on the construction of the schoolhouse, with the then accrued interest. Although the judgment,

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which was upon stipulation, in that action was offered in evidence herein and is in the bill of exceptions, and from its form as it there appears it might give some color to appellant's contention, yet as no further portions of the record in that other action are before us, we are bound by the findings of the trial court as to what was determined by that action, for we must presume the findings herein were based upon records before him and not before us, especially as there was no exception taken to such finding by appellant.

Giving effect to this finding as to the judgment of February 13, 1913, it must be held to have determined nothing more than that the attempted levy of a tax for $477 in August, 1912, was invalid because in excess of the amount which could be lawfully raised in said district in one year. Such a judgment in February, 1913, could not affect proceedings based upon that which is done, or attempted to be done, in June, 1915. Nor are the proceedings of this later date a revival or renewal of the proceedings of August, 1912, and consequently not a violation of any order restraining proceedings to levy a tax in 1912.

Under sec. 40.09, Stats., the electors of the school district in meeting assembled shall have the power to vote such tax as the meeting shall deem sufficient to build a schoolhouse.

Under sec. 40.26 the school district board shall, when lawfully directed by the electors, build a schoolhouse "out of the funds provided for that purpose."

Under these provisions of the statutes, when the school district decided to build, the maximum cost for such building was fixed at the amount of the fund then and there provided, viz. the $1,700. The school board had no authority or power to bind the school district in excess of that amount. *Nevil v. Clifford,* 63 Wis. 435, 443, 24 N. W. 65; 35 Cyc. 951, 952; *Knaack v. School Tp.* 179 Iowa, 410, 161 N. W. 446; *School Dist. v. Brown,* 2 Kan. App. 309, 43 Pac. 102; *School Dist. v. Western T. Co.* 5 Wyo. 185, 38 Pac. 122; *Capital Bank v. School Dist.* 1 N. Dak. 479, 48 N. W. 363.

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The same rule seems to be, impliedly at least, recognized in the case of *State ex rel. Gilbert v. Philipp,* 163 Wis. 613, 158 N. W. 331.

No question has been raised by appellant, nor can we find a foundation for any such in the record before us, but that the school district in July and August. 1911, had the lawful power to vote and provide a tax for a sum equal to the $2,250, the contract price of the building, if they had at that time so chosen to do instead of fixing the amount at the $1,700 which they did, without violating the provision of sec. 3, art. XI, Const., as it stood at the time, which limited the aggregate indebtedness of any such corporation to five per centum on the value of the taxable property therein. The burden, of course, would be upon the plaintiff in this case to have shown that such sum would have been in excess of such constitutional limitation. *Montpelier S. B. & T. Co. v. School Dist.* 115 Wis. 622, 92 N. W. 439. Assuming, therefore, the power in 1911, it was within the power of the electors of the school district in 1915 to ratify, approve, and make their own that which they might have lawfully done in 1911, namely, to fix and raise the amount of $2,250 for such school building instead of the $1,700, and when, as here, with a complete knowledge of what had been done, a formal acceptance of the building and its use by the school district, they lawfully ratified, approved, and confirmed the acts that might have lawfully been done in the first instance and thus created an obligation for the notes executed in June, 1915, as was found by the trial court. *Thomson v. Elton,* 109 Wis. 589, 85 N. W. 425; *McGillivray v. Joint School Dist.* 112 Wis. 354, 88 N. W. 310; *Monaghan v. School Dist.* 38 Wis. 100.

The distinction is clear between this case and those in which the act attempted to be ratified would have been absolutely beyond the power of the same body to do in the first instance and therefore void and incapable of ratification, as

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in *Balch v. Beach,* 119 Wis. 77, 95 N. W. 132; *Glidden State Bank v. School Dist.* 143 Wis. 617, 128 N. W. 285.

Other questions raised by the appellant we do not deem it necessary to discuss.

By the Court.—Judgment affirmed.

WIEDENBECK-DOBELIN COMPANY, Appellant, vs. ANDERSON and another, imp., Respondents.

November 6—December 3, 1918.

Conditional sale contract: Assignment by vendor: Title of assignee: Remedies of vendor: Election.

1. Where a conditional contract of sale, providing that title to the goods sold should remain in the vendor until full payment of the purchase price, and a judgment recovered by the vendor upon notes given by the vendee pursuant to said contract, were duly assigned by the vendor and the assignees took immediate possession of a part of the goods in which no interest had been acquired by third persons, the title to the goods so taken vested in the assignees, and a subsequent sale under an execution levied upon such goods as the property of the original vendee was void.
2. The action by the vendor upon notes given by the vendee did not operate to convert the conditional contract into an absolute sale.
3. The vendor's remedies to enforce payment by action upon said notes and by taking the goods after default in payment of the price were not inconsistent, so as to require an election between them, but were cumulative and might both be pursued.

APPEAL from a part of a judgment of the circuit court for Dane county: GEORGE CLEMENTSON, Judge. *Affirmed.*

This action was brought for the recovery of seven manure spreaders and other machinery, or, in lieu of the return thereof, $700, the value of the machinery, together with the costs of the action.

The *Wiedenbeck-Dobelin Company* is a corporation doing business at Madison, Wisconsin. The defendants are

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brothers. *B. G.* and *L. G. Anderson* are in business in Chicago; Torval and Ole Anderson live at Rockdale, Wisconsin, and were the principal stockholders in the Anderson Brothers Manufacturing Company, a concern engaged in manufacturing and retailing machinery.

On March 25, 1914, the John Deere Plow Company of Moline, Illinois, entered into a conditional sales contract with the Anderson Brothers Manufacturing Company of Rockdale, Wisconsin, by which it sold and delivered to them thirteen manure spreaders at the price of $97 each and one manure spreader at the price of $100; the sales contract providing, among other things, that

"the title to and ownership of all goods shipped under this contract shall remain vested in the John Deere Plow Company of Moline until the purchase price thereof shall be paid in cash, and until all notes given therefor, and to be given under this contract, are paid; and the said John Deere Plow Company of Moline shall be entitled to possession of the same whenever the said John Deere Plow Company of Moline may feel insecure, or when I or we may become insolvent or bankrupt; but nothing in this contract shall be deemed as releasing me or us from my or our obligation to pay for said goods and all notes hereby contemplated."

Two copies of the conditional sales contract were executed and one of the copies was filed with the clerk of the village of Rockdale. The John Deere Plow Company later brought suit against the Anderson Brothers Manufacturing Company to recover on two notes given pursuant to the conditional sales contract and on a small account, and March 25, 1916, recovered judgment for $771.65 in the circuit court for Dane county. An execution upon the judgment was issued the same day and was delivered to the sheriff, who returned it unsatisfied on June 21, 1916. The return was filed June 26, 1916.

On April 26, 1916, the Anderson Brothers Manufacturing Company had on hand seven of the fourteen manure spreaders purchased by it from the John Deere Plow Company, no part of the purchase price thereof having been paid. On

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that date the John Deere Plow Company, for the consideration of $700, assigned the judgment and the conditional sales contract and transferred its interest in the seven spreaders to *L. G.* and *B. G. Anderson,* the instrument of assignment bearing the date of April 13, 1916. Immediately after delivery of the assignment to *B. G.* and *L. G. Anderson* they took possession of the seven manure spreaders, locked them in a store room, retained one key to the room themselves, and gave a duplicate to Torval Anderson, whom they made their agent. The written assignment was filed in the office of the clerk of the circuit court for Dane county on May 15, 1916.

On April 26, 1916, *L. G.* and *B. G. Anderson* also purchased from the Anderson Brothers Manufacturing Company a Beaver Dam drill for $65, an Ideal drill for $45, and one Dain mower for $45, which implements are also involved in this action.

On March 6, 1916, Gustave A. Seefeld and Henry F. Seefeld obtained a judgment in a justice's court of Dane county against the Anderson Brothers Manufacturing Company for $114.09 principal with $8.75 costs, and on April 18, 1916, filed a transcript of this judgment in the office of the clerk of the circuit court for Dane county. On June 26, 1916, an execution upon this judgment was issued for $131.39 to the sheriff of Dane county, and on July 3, 1916, the sheriff levied upon the following property as that of the Anderson Brothers Manufacturing Company: seven manure spreaders, one Beaver Dam drill, one Ideal drill, one Dain mower, one office desk, one iron safe, one clock, two gasoline engines, one platform scale, two Thor motorcycles, one circular saw outfit, thirty plowshares, 500 pounds bar iron, one bellows, 100 pounds horseshoes, two forges, two anvils, two vises, one drill, one tire set, one foot vise, three sets of shaft tips, three sets of bows, and some assorted bolts and scrap iron.

All of the above described property was struck off to the plaintiff for $80 at an execution sale held July 24, 1916.

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At the time of the commencement of this action *B. G.* and *L. G. Anderson* had possession of the seven manure spreaders, the Beaver Dam drill, the Ideal drill, and the Dain mower, and held the same. The *Wiedenbeck-Dobelin Company* brought suit for the possession of these implements, claiming title under the execution sale.

The circuit court found that at the time of the issuing of the execution in the Seefeld case and at the time of the seizure and sale of the seven manure spreaders the Anderson Brothers Manufacturing Company had no title to or interest therein, but that the title remained in *L. G. Anderson* and *B. G. Anderson* as the assignees of the John Deere Plow Company. The court also found that the Anderson Brothers Manufacturing Company, in making the sale of two drills and one mower to *L. G.* and *B. G. Anderson,* did not comply with the provisions of sec. 2317*c,* Stats., and that no attempt to comply with the provisions of said section in the sale and purchase of the two drills and mower was made by any of the parties to said transaction, and that the attempted sale of these drills and mower resulted in no title to or interest therein passing to *L. G.* and *B. G. Anderson.*

The defendants *L. G.* and *B. G. Anderson* were awarded damages of $46.50. Appeal is taken from a part of this judgment.

For the appellant there was a brief by *Gilbert & Ela* of *Madison,* and oral argument by *Emerson Ela.*

For the respondents, *L. G.* and *B. G. Anderson,* there was a brief by *Gettle & Torge* of Madison, and oral argument by *L. E. Gettle.*

SIEBECKER, J. It is considered in this case that the trial court correctly held that *L. G.* and *B. G. Anderson* were entitled to the possession of the seven manure spreaders upon the following grounds:

1. The conditional sales contract between the John Deere Plow Company and the Anderson Brothers Manufacturing

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Company was a valid and subsisting contract between these parties in April, 1916, when the Plow Company assigned it and the judgment held by the Plow Company against Anderson Brothers Manufacturing Company to *L. G.* and *B. G. Anderson* in consideration of their payment to the Plow Company of the sum of $700.

2. No third person had acquired any interest in the seven manure spreaders here involved at the time of such assignment, and *L. G.* and *B. G. Anderson* acquired the title to them under such written assignment. They immediately took possession thereof and had possession of them as their property on the 3d day of July, 1916, when the sheriff levied thereon under the execution issued on the Seefeld judgment as the property of the Anderson Brothers Manufacturing Company; and such execution levy and the sale thereunder were illegal and void.

3. The plaintiff acquired no interest in or right to these seven spreaders as purchaser at such execution sale and hence is not entitled to recover possession of them in this action.

4. The action of the John Deere Plow Company on notes given by the Anderson Brothers Manufacturing Company for goods sold and delivered to it did not operate to convert the conditional sale of such manure spreaders into an absolute sale.

The contract provides that title to goods sold under it shall remain vested in the John Deere Plow Company *"until the price thereof shall be paid in cash and until all notes given therefor and to be given under this contract are paid."* It is without dispute that the cost price for these spreaders had not been paid by the Anderson Brothers Manufacturing Company before the Plow Company brought the action on the notes, nor was payment thereof obtained in any proceeding in that action. The fact is that the purchase price for the manure spreaders had not been paid when the Plow Company took possession of them and sold them and deliv-

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ered them to *L. G.* and *B. G. Anderson* in April, 1916. The judgment on the notes in no way changes the contract obligation for payment of the purchase price nor affects the Plow Company's right under the contract to enforce its security to secure payment by taking the property in default of payment of the purchase price.

These two remedies of enforcing such payment do not constitute inconsistent rights for the enforcement of this obligation and hence impose no alternative to elect between them. They are cumulative and give the Plow Company the right to pursue both to secure payment of its claim. *Ratchford v. Cayuga Co. C. S. & W. Co.* 217 N. Y. 565, 112 N. E. 447; *Carpenter v. Meachem*, 111 Wis. 60, 86 N. W. 552.

Upon the foregoing grounds the judgment of the circuit court must be upheld, and other questions referred to in the argument do not require treatment on this appeal.

By the Court.—The judgment is affirmed.

ROBERTS, Respondent, vs. HARRINGTON, Appellant.

November 6—December 3, 1918.

Real-estate brokers: Contract for "exclusive sale:" Construction.

Where no consideration was paid by a real-estate broker for a contract giving him for a certain time the "exclusive sale" of a farm, and he incurred no obligation to do anything, such contract, while it precluded the owner from giving any one else the power to sell, did not preclude a sale by the owner himself, during the period named, in the absence of clear and unequivocal language negativing such right on his part. KERWIN and ESCHWEILER, JJ., dissent.

APPEAL from a judgment of the circuit court for Dane county: E. B. BELDEN, Judge. *Reversed.*

Action to recover a two per cent. commission for the sale of defendant's farm of 185 acres, founded upon a written

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contract stating that defendant "gives to party of the first part [plaintiff] the exclusive sale of" his farm upon specified terms for a period of four months from December 13, 1916, the date of the contract. On April 3, 1917, defendant sold the farm to one Schoeneman for $7.50 per acre less than the price specified in the contract and without any knowledge that plaintiff had endeavored to interest Schoeneman in the purchase of the farm. At the close of the testimony the court directed a verdict for plaintiff for $420, and from a judgment entered accordingly the defendant appealed.

For the appellant there was a brief by *Hill & Spohn* of Madison, and oral argument by *W. H. Spohn.*

For the respondent there was a brief by *Gilbert & Ela* of Madison, and oral argument by *F. L. Gilbert.*

VINJE, J. The evidence shows without dispute that plaintiff had repeatedly sought to interest Schoeneman, among others, in the purchase of the farm and had gone to some expense to secure a purchaser upon the terms specified. It also likewise shows that he had been unable to secure a purchaser, and that neither he nor Schoeneman nor any one else had informed the defendant that plaintiff had endeavored to induce Schoeneman to buy the farm. The sale was therefore made by defendant to a person to whom he believed and had reason to believe he had a perfect right to sell without incurring any liability for a commission, unless the contract giving plaintiff the "exclusive sale" of the farm for four months prevented him from making a sale during the life of the contract. It is well settled that the giving of an *exclusive agency* to sell real estate does not preclude the owner from selling within the life of the contract to one who he has reason to believe has not been procured by the agent. *Greene v. American M. Co.* 153 Wis. 216 (140 N. W. 1130), and cases cited on p. 222; *Kimball v. Hayes,* 199 Mass. 516, 85 N. E. 875.

Does a contract giving the "exclusive sale" of real estate to another preclude the owner from selling while the con-

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tract is in force? It is true the words will technically bear that construction. But when we stop to reflect upon the situation of the parties and the object sought to be attained as well as the content of this contract, we should not give it that construction unless the language is so clear and unambiguous as not to bear any other. The owner wants to sell his real estate. To that end he calls to his assistance one engaged in the real-estate business—the broker, who becomes his agent for that purpose. The relation of principal and agent is established. It is obvious that for the protection of the agent it is often desirable that he should be the exclusive agent and should be protected against the chance of other agents reaping the benefit of his labor in securing purchasers—hence arise contracts for exclusive agencies. The idea, however, that the owner shall be excluded from the right to sell his own property goes deeper and is so inconsistent with the notion of ownership and the *jus disponendi* thereto appertaining that clear and unequivocal language must be employed to negative such right. In the present contract, as is usual in such contracts, the broker does not bind himself to do anything. He may remain idle for the whole duration of the contract and the owner cannot, pursuant to any terms thereof, even censure him for his inactivity. He has incurred no obligation to act. Whether he does or not is a matter of choice with him. Under such a situation the owner's right to sell should not be construed away upon ambiguous language. The words "exclusive sale" may well mean exclusive agency to sell—the idea being that the owner shall employ no other agent and that the broker shall have the only grant of power to sell that the owner will execute—hence he shall have the exclusive sale. It is not unusual to hear real-estate brokers say, "I have the exclusive sale of that property," when all they mean is that they have the exclusive agency for its sale. If spoken words may have that meaning so may also written, for ordinarily language acquires no new or different

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meaning by being reduced to writing. Hence the words "exclusive sale" may be construed to be an inhibition upon the owner to grant to any one else the power to sell, rather than an inhibition upon his own right to sell. We so construe them, for in order to negative the latter's right, as before stated, clear and unequivocal language to that effect must be employed.

It is said in some of the cases that there is a difference between an exclusive agency and an exclusive sale, but in all the cases called to our attention such statement is made *arguendo,* in construing contracts of agency or of exclusive agency. Such are the following: *Armstrong v. Wann,* 29 Minn. 126, 12 N. W. 345; *Putnam v. How,* 39 Minn. 363, 40 N. W. 258; *Dole v. Sherwood,* 41 Minn. 535, 43 N. W. 569, 5 L. R. A. 720; *Golden Gate P. Co. v. Farmers' Union,* 55 Cal. 606; *Ingold v. Symonds,* 125 Iowa, 82, 99 N. W. 713. In the latter case a contract giving a broker "exclusive *authority* to procure a purchaser" within a definite time was construed not to prevent the owner from selling. The court said: "The right of an owner to sell his own property is an implied condition of every contract of agency, and unless expressly negatived will prevail." We have been unable to find a case where the precise question here presented has been decided. The nearest one is that of *Fairchild v. Rogers,* 32 Minn. 269, 20 N. W. 191, where a broker paid the owner $250 cash for the exclusive right to sell a certain piece of real estate for sixty days upon agreed terms. The court held that the owner could not sell within that time. The contract was oral, is not set out in the report of the case, and the question of its breach is not specifically treated. In view of the consideration paid by the broker for the contract it was no doubt correctly construed. But where, as here, no consideration is paid for the contract and no obligation incurred by the broker to do anything, we deem the construction reached by us to be the more equitable and reasonable.

It should be added that we reach our conclusion from the

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terms of the contract itself, irrespective of the fact that defendant testified without contradiction that plaintiff told him that if defendant made a sale plaintiff would get no commission.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint upon the merits.

KERWIN, J. *(dissenting).* The contract between the parties in this case is as follows:

"It is herein agreed by and between *Frank Roberts,* of Dodgeville, Wisconsin, party of the first part, and *C. Harrington,* of Madison, Wisconsin, party of the second part:

"Party of the second part gives to party of the first part the exclusive sale of his land in the town of Arena, county of Iowa, state of Wisconsin, for a period of four months from the date of this contract; number of acres of land, 185; price per acre, $120. Party of the second part agrees to pay party of the first part a commission of two per cent. All in excess of the contract price shall belong to the party of the first part.

"Party of the second part agrees to accept $5,000 or $6,000 down, balance to be left on the land at a rate of five per cent. interest, purchaser having the right to pay one hundred dollars or any multiple of one hundred at interest-paying day. Total amount must be paid in ten years.

"Party of the second part agrees to furnish an abstract and convey the land by a warranty deed. This contract does not expire if the land is sold to any prospect furnished by party of the first part.

"Dated at Madison, county of Dane, state of Wisconsin, this 13th day of December, 1916.

"C. HARRINGTON. (Seal.)"

This contract was accepted, acted upon by respondent, and became a binding contract between the parties.

The cases relied upon by the appellant here are where an exclusive *agency* was given, not an exclusive *sale.* While there is conflict in the authorities as to whether or not an exclusive agency precludes the owner from selling without

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becoming liable for commission, it is settled in this court that an exclusive agency does not preclude the owner. This is upon the ground that an exclusive agency means that no other agent shall be employed. An exclusive sale is quite a different thing; and where an exclusive sale is given by the owner for a definite period of time the owner is precluded from selling during that period. The question has not been directly passed upon by this court, but in *Greene v. American M. Co.* 153 Wis. 216 (140 N. W. 1130), at p. 222 it is said:

"A distinction is made in some cases between exclusive power to sell and exclusive agency to procure a sale or find a purchaser; in others between an exclusive agency and an agency for a particular time, where, within it, the agent, proceeding in good faith, finds a purchaser; between a sale, as in this case, without any interference on the part of the agent, and a sale to a person to whose attention the property is brought by the agent. Here there was the ordinary exclusive agency to find a purchaser, and, after long delay, the owner made a sale without the agent being connected with it in any way. In such circumstances the agent is not entitled to commission."

In the instant case the respondent accepted the contract, did considerable work and incurred expense in endeavoring to make the sale. He negotiated with the person to whom the appellant made the sale, had from ten to fifteen interviews with him, urging him to make the purchase and representing that the property was the cheapest in the county. Even if the sale had been made under an exclusive agency the appellant was not entitled to make the sale at a reduced price to a purchaser with whom the respondent had been negotiating and escape the payment of commission. *Oliver v. Katz,* 131 Wis. 409, 111 N. W. 509; *Stewart v. Mather,* 32 Wis. 344.

In the instant case the contract is plain and unambiguous. It gave to the respondent for a period of four months the exclusive sale. This can mean but one thing, viz. that dur-

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ing the time given the owner was precluded from making a sale without rendering himself liable for the commission. *Fairchild v. Rogers,* 32 Minn. 269, 20 N. W. 191; *Lapham v. Flint,* 86 Minn. 376, 90 N. W. 780; *Blumenthal v. Bridges,* 91 Ark. 212, 120 S. W. 974; *Schultz v. Griffin,* 5 Misc. 499, 26 N. Y. Supp. 713; *Alexander v. Breeden,* 14 B. Mon. (Ky.) 154; *Stringfellow v. Powers,* 4 Tex. Civ. App. 199, 23 S. W. 313; *Goldsmith v. Coxe,* 80 S. C. 341, 61 S. E. 555.

A claim for reformation, by changing the words of the contract from "exclusive sale" to "exclusive agency," was made in the answer. There was no evidence to support this claim and it was abandoned and not urged in the brief or upon oral argument. It was admitted upon oral argument that the claim for reformation was not urged.

Nor is there any room for the contention that the appellant did not understand the contract. The evidence on the part of the appellant upon this point is negative and evasive, while on the part of the respondent the evidence is clear and positive to the effect that the appellant understood the contract.

It is said in the majority opinion that independent of the contract the evidence that respondent was not to have exclusive sale is undisputed. Obviously the court overlooked the following evidence:

"*Q.* What conversation had you with him with regard to having an exclusive right of sale for four months? (Objected to; objection overruled.) *A.* Well, when I talked with him before, I told him that I wouldn't take the farm without I had the exclusive sale of it, to advertise it and such things.

"*Q.* What did he say to that? *A.* He said he was willing."

Ingold v. Symonds, 125 Iowa, 82, 99 N. W. 713, is relied upon by the court, but it will be seen that in that case an exclusive sale was not given. The court said:

"It will be observed that plaintiff was not given the ex-

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clusive sale of the property. . . . The only effect of such a contract as the one now before us is to forbid the owner from placing the property in the hands of any other agent."

Reference is also made to *Fairchild v. Rogers,* 32 Minn. 269, 20 N. W. 191, as being distinguishable because a consideration of $250 was paid for the exclusive right of sale. There was a valid consideration for the contract in the case at bar by the acceptance of the contract, performance of services, and expenditure of money in the execution of it, as effectual and binding as if money were paid. This is well settled. *Superior C. L. Co. v. Bickford,* 93 Wis. 220, 67 N. W. 45; *Hooker v. Hyde,* 61 Wis. 204, 21 N. W. 52; *Goward v. Waters,* 98 Mass. 596.

It is true that an owner has the right to sell his own property. The *jus disponendi* is in him. But it is equally clear that he may for a limited period of time divest himself of that right and vest it in another. The giving of an exclusive sale of property for a limited period of time accomplishes that purpose. I have found no case to the contrary. It is true there is a dearth of authority on the particular point in the case at bar. There are many cases involving exclusive agency in this and other courts, and the reasoning in these cases tends strongly to show that, while an exclusive agency does not divest the owner of the right to sell his own property, the contract of exclusive sale does. There is reason and equity in the rule. A broker does not wish to spend time and money in endeavoring to make a sale if the owner at any time can make a sale and leave the broker without commission or compensation for his services. In the instant case the respondent had a contract giving him the exclusive sale for four months. He spent much time and money in endeavoring to sell the property. The appellant stepped in and sold to the person with whom respondent had been negotiating before the time limited in the contract had expired. It cannot be said that respondent would not have sold during

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the life of the contract. I am satisfied that the judgment below is right and should be affirmed.

Mr. Justice ESCHWEILER concurs in the foregoing dissent.

NOTBOHM, Appellant, vs. PALLANGE, Respondent.

November 6—December 3, 1918.

New trial: Constructive denial of motion: Appealable orders: Jurisdiction: Supreme court: Superintending control over inferior courts.

1. Under sec. 2878, Stats. 1917, the constructive denial of a motion for new trial, resulting from failure to decide such motion within sixty days after the verdict, has the same effect as a formal order of denial; but such an order is not appealable.
2. Where the sixty days after verdict expired without extension of the time by order and without waiver, a subsequent formal order granting the motion was a nullity, the court having no jurisdiction to grant or to proceed with a new trial, but only to proceed to judgment.
3. The superintending control over inferior courts, vested in the supreme court, provides an ample and speedy remedy where a trial court fails to perform an imperative duty and there is no adequate remedy by appeal.

MOTION to dismiss an appeal. The action was for breach of promise of marriage and was tried before a jury, which returned a special verdict deciding the issues in plaintiff's favor May 23, 1918, and assessing her damages at six cents. A motion for new trial on the minutes of the court was thereafter made by the plaintiff which was not decided by the trial judge until July 30th, when a written decision was filed to the effect that the verdict be set aside for inadequacy of the damages and that a new trial be granted. The court had not by order extended the time for the hearing and decision of the motion, nor had there been any waiver by the attorneys in the case of the provision of sec. 2878, Stats. 1917, requiring the motion to be made, heard, and decided within sixty days after rendition of the verdict, and if not

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that it "shall be taken as overruled." The plaintiff appeals from the "constructive denial" of her motion for new trial resulting from the failure to decide the motion for a new trial within sixty days after the verdict, and the defendant moves to dismiss that appeal.

H. K. Curtis of Milwaukee, for the motion.

Benjamin Poss of Milwaukee, *contra.*

PER CURIAM. It is clear that under the provisions of sec. 2878, Stats. 1917, the constructive denial of the motion for new trial, resulting from the failure to decide the same within sixty days after the rendition of the verdict, became an order denying the motion, of like effect as a formal order of denial. The statute, however (sec. 3069, Stats. 1917), gives no appeal from an order denying a motion for a new trial, and this court cannot give an appeal where the statute gives none.

Some suggestion was made that by reason of the subsequent formal order granting a new trial the constructive denial could not be followed by judgment and became in effect an order determining the action and preventing a judgment, hence an appealable order within the first subdivision of sec. 3069, *supra.*

Not so, however. If the sixty days expired without extension of the time by order and without waiver there was no jurisdiction to grant the motion (*Ward v. Smith,* 166 Wis. 342, 165 N. W. 299), and the trial court will have no jurisdiction to proceed with a new trial, but only to proceed to judgment on the verdict.

The power of superintending control vested in this court provides an ample and speedy remedy where the trial court fails to perform an imperative duty and there is no adequate remedy by appeal. *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081; *State ex rel. Mitchell v. Johnson,* 105 Wis. 90, 80 N. W. 1104.

Appeal dismissed.

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ELLINGSON LUMBER COMPANY and another, Appellants, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

November 7—December 3, 1918.

Workmen's compensation: Injury by freezing: Exposure increased by nature of services: "Caused by accident."

1. Under the statute, compensation is not given for an injury resulting from exposure to a hazard (such as freezing) which is not peculiar to the industry or substantially increased by reason of the nature of the services which the employee is required to perform.
2. The causative danger need not have been foreseen or expected, but after its event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.
3. Where, by reason of a misunderstanding of orders, a woodsman was, on a very cold day, obliged to work harder than usual in getting out logs for hauling, and as a result his feet became wet from perspiration and froze as he returned to camp, it is *held* that the exposure to injury by freezing was substantially increased by reason of the nature of the services he was obliged to perform, and that the injury was proximately caused by accident within the meaning of sub. (3), sec. 2394—3, Stats.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Workmen's compensation. This action was begun to set aside an order of the *Industrial Commission* dated December 1, 1917, awarding to defendant *Beaulieu* certain compensation, on the ground that the finding of the *Commission* that the injuries suffered by the defendant *Beaulieu* were proximately caused by accident was not supported by the evidence.

The defendant *Beaulieu* was employed by the plaintiff lumber company as a woodsman, and at the time of his injury was engaged as a swamper and was working about one and three-quarters miles from the camp. On the morning of the day of the accident the weather was from twenty to

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twenty-six degrees below zero, moderated during the day, and grew colder again toward night. In the afternoon the defendant *Beaulieu* went to work at the wrong skidway. About 3 o'clock in the afternoon the foreman discovered the error, at which time the defendant returned to the right skidway, found that they were behind on account of the mistake, and the defendant *Beaulieu* says that as a result he "rushed to get some logs ahead ready for the next morning, and by that time my feet sweat awful hard. About 5 o'clock I got ready to go to camp, and it was all ice from the woods clear up to camp, and my feet was wet and was awful cold that night, and before I got to camp I commenced to feel cold on my feet . . . and afterwards found that they were frozen hard."

Upon this and other testimony to the same effect the *Commission* found that the defendant *Beaulieu* sustained personal injury resulting in his disability while in the employ of the plaintiff lumber company and while performing service growing out of and incidental to his employment; that such injury was proximately caused by accident; and other formal findings. An order was entered awarding the defendant *Beaulieu* compensation, and from the judgment of the circuit court affirming such order the plaintiffs appeal.

For the appellants there was a brief by *Brown, Pradt & Genrich* of Wausau, and oral argument by *L. A. Pradt.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

ROSENBERRY, J. Plaintiffs claim that an injury by a frost bite is not an injury proximately caused by accident within the meaning of sub. (3), sec. 2394—3, Stats.

"Section 2394—3. Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death,

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in those cases where the following conditions of compensation occur:

"(1) . . .

"(2) . . .

"(3) Where the injury is proximately caused by accident, and is not intentionally self-inflicted."

The facts being undisputed, the question is, Has the employee, *Beaulieu,* brought himself within the provisions of the act under the doctrine approved by this court in the case of *Hoenig v. Industrial Comm.* 159 Wis. 646, 150 N. W. 996? See cases cited. Injuries to employees for which compensation is to be paid under the workmen's compensation act are such as are incidental to and grow out of the employment. Compensation is not given for an injury resulting from exposure to a hazard which is not peculiar to the industry or substantially increased by reason of the nature of the services which the employee is required to perform.

Injury by freezing is certainly not peculiar to the industry in which the defendant *Beaulieu* was engaged. Did the nature of *Beaulieu's* employment expose him to a hazard from freezing which was substantially increased by reason of the services which he was required to perform? It has been well said that the causative danger need not have been foreseen or expected, but after its event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. *McNicol's Case,* 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306.

On the day in question, by reason of the mistake, the defendant *Beaulieu* worked harder than he ordinarily did, as a result of which his feet became wet from perspiration, a circumstance which made them much more susceptible to cold, and as a consequence thereof his feet were frozen. It seems clear that the hazard to which the defendant *Beaulieu* was exposed was one which was incident to and can be fairly traced to his employment as a contributing cause and

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that he would not have been equally exposed to such a hazard apart from his employment. If the defendant *Beaulieu* while engaged in his work had wet his feet by stepping into an open spring and the freezing had resulted therefrom, it could scarcely be claimed that the injury was not proximately caused by accident. In this case the condition of his feet was due to extra exertion caused by reason of a misunderstanding as to orders. Because there would be no logs for hauling in the morning, he was required to put forth an unusual and extra effort which made him more susceptible to cold than he otherwise would have been. It is clear that the exposure of the defendant *Beaulieu* to injury by freezing was substantially increased by reason of the nature of the services which he was obliged to render. We think it must be held that the injury for which compensation was awarded was proximately caused by accident within the meaning of sub. (3), sec. 2394—3, Stats.

By the Court.—Judgment affirmed. Costs to be taxed against the appellants in favor of the respondent *Beaulieu*.

OWEN, J., took no part.

BEKKEDAL LUMBER COMPANY, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

November 7—December 3, 1918.

Workmen's compensation: Performing services growing out of and incidental to his employment: Death from dynamite explosion: Presumption against suicide.

Where the foreman of a crew engaged in constructing a logging road and dynamiting stumps therein was instantly killed during the noon hour, while the other men were at dinner, by an explosion of dynamite under circumstances indicating that he may have been attempting to blow up a stump tree or a partly blasted stump which had been left in the roadway, a finding by the industrial commission that he was at the time performing service growing out of and incidental to his employment is *held* to have been warranted. The presumption against suicide was properly applied.

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APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

George S. Perry, husband of respondent and claimant *Victoria M. Perry,* was killed December 3, 1915. He was then employed by appellant as foreman in charge of a logging crew, some of whom, under his direction, were on that day at work constructing a logging road. In such work another employee of appellant named Boritz, an expert in the use of dynamite, had charge of the work of exploding stumps within such new road and under the supervision of the deceased. Perry had had some former slight experience in handling and knew of the method of the use of such explosive in that kind of work. On the day in question all the men working there, except the deceased, left the place at which the work was being done, for the noon hour. Before leaving Boritz left a small quantity of dynamite and some fuses near a tree just outside of the road and at some thirty or forty paces back of the place where the explosive had been used during the forenoon. On the return of the men from dinner they found the body of the deceased lying at the foot of a small tree or sapling in about the center of the road and about twenty feet away from and nearly opposite the tree where the dynamite had been left. He had evidently been instantly killed from the effect of an explosion of dynamite which caused an injury to the top and front part of his skull and to the thumb and some of the fingers of one hand. Small fragments of the cap which he wore appeared to have been imbedded in the sapling near which his body was found and at a height of about three feet from the ground. Some ten or twelve feet back from the sapling and in the roadway was a stump which had been partially exploded and portions of which were still to be removed. There was nothing to indicate that any of the necessary preparations had been made by Perry to explode the small tree or sapling near which his body was found, nor anything else in that vicinity, and the testimony indicated that it was

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neither customary nor necessary to remove such small sized trees or such partially exploded stumps by the use of explosives. The exploding cap used by Perry must have been obtained by him at some other time than at this noon hour, as there were none such left by Boritz with the dynamite and fuse.

The plaintiff conceded that it did not claim that the facts disclosed as to this death were such that the *Commission* ought to find that the death was by suicide and the injuries, therefore, intentionally self-inflicted, but insisted that the burden was upon the claimant to show that the accident occurred while performing services in the course of the employment.

The *Commission* found that the deceased, while in the employment of the appellant, sustained a fatal accident from which death resulted immediately and while he was engaged in performing service growing out of and incidental to such employment; and in its decision accompanying the award said:

"As indicating accident, it must be kept in mind that the use of dynamite for blasting purposes is attended with real hazard. There was a tree and one or more scattering stumps very near the place where the body was found. There was good reason for blowing these out while the men were at dinner, or at least away from the premises. This tree and the stumps were quite near the place where the men were grading, while the principal blasting operations were being carried on at the head of the course and away from the major portion of the crew. We think the facts indicate that he remained at the place after the crew went to dinner in order to clear away the tree or stumps, or both, that were soon to interfere with the progress of the grading, and that in pursuing this work he met his death."

The court below in the action brought to review such finding sustained the award of the *Commission*, and this appeal was taken from the judgment entered in accordance therewith.

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For the appellant there was a brief by *Brown, Pradt & Genrich* of Wausau, and oral argument by *L. A. Pradt.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

ESCHWEILER, J. The appellant contends that the facts in the record before the *Commission* were not such as to warrant the inference arrived at by the *Commission* that Perry's death occurred while he was in the performance of his duty and in the master's employment, and that such conclusion must have been based upon mere conjecture, and that therefore the claimant had not met the burden of proof imposed upon her under the law.

It is also contended that there was no evidence showing that there was any reason for blowing up the tree near which Perry was found dead or that there was any further work of blasting required for the stump already partly blasted, which was near where his body was found, and that there was no foundation for the suggestion by the *Commission* in their finding that Perry remained at the place after the crew went to dinner in order to clear away the tree or stumps, and that therefore there was a total absence of evidence upon which might be predicated a finding that Perry met his death while within the scope of his employment.

It is undoubtedly the rule of law in this state that findings of the *Industrial Commission* must be supported by evidence and not based upon mere conjecture. *Voelz v. Industrial Comm.* 161 Wis. 240, 152 N. W. 830.

The situation here was one clearly requiring the *Commission* to apply the well recognized presumption against suicide in such cases of accidental death. *Milwaukee W. F. Co. v. Industrial Comm.* 159 Wis. 635, 150 N. W. 998. With that presumption, therefore, and the facts disclosed in the testimony of Perry's employment as foreman in charge of

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the construction of this road; that explosives were properly used in such work and under his direction; the partially exploded stump left in the road, or even the sapling near which he was found, upon either of which Perry might have been contemplating the use of dynamite, even though such use might not have been in accordance with the customary or economical way of constructing such a road, all presented a situation from which the conclusion might have been reasonably and properly drawn that whatever Perry was then doing was within what he then thought was his duty, rather than the conclusion that it was an intentionally self-inflicted injury. Within the broad field intended to be covered by our compensation act, we think the conclusion arrived at by the *Commission* was within their discretion.

The result arrived at in this case is in harmony with such cases as *Heileman B. Co. v. Shaw,* 161 Wis. 443, 154 N. W. 631, where the injured body of the brewery workman was found in the building where he was employed with no evidence as to how he met his death; *Haller v. Lansing,* 195 Mich. 753, 162 N. W. 335, where the workman was injured by gasoline explosion in a tool shed where he was lighting his pipe after eating his lunch; *State ex rel. Duluth B. & M. Co. v. District Court,* 129 Minn. 176, 151 N. W. 912, where the employee was injured by the explosion of a cartridge shell supposed by him to be empty and which he was fashioning into a key for his own convenience in doing his work.

We see a substantial difference between the facts in this case and those in the case relied upon by appellant (*Savage's Case,* 222 Mass. 205, 110 N. E. 283), where a foundry employee was killed on the main track of the railroad eight feet away from the place where he had been at work on a spur track unloading pig iron for the foundry, where no reason was shown for his leaving the place of his employment to go upon the railroad, for here the deceased was on a road which was being constructed under his direction and where

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his employment required him to be and while handling material which was used in construction work and under his control.

By the Court.—Judgment affirmed, with costs against the appellant.

OWEN, J., took no part.

WADLEIGH, Respondent, vs. STEWART and others, Appellants.

November 7—December 3, 1918.

Attorney and client: Recovery of money advanced for settlement: Fraud.

In an action by an attorney against former clients to recover $200 advanced for them to settle certain litigation, a verdict for plaintiff should have been directed, the clients having taken and retained the fruits of such settlement, which is shown to have been a desirable one, and the proof being wholly insufficient to sustain a claim that there was fraud on plaintiff's part in advising the settlement.

APPEAL from a judgment of the circuit court for Dane county: G. N. RISJORD, Judge. *Affirmed.*

The plaintiff, an attorney at law, sued the defendants, his former clients, to recover a bill for professional services and the sum of $200 advanced by him to settle a certain litigation. There is no controversy here except as to the $200 item, and as to this the defense was that, in order to induce the main defendant, *Jennie T. Stewart,* to consent to the settlement, the plaintiff so carelessly and negligently misstated the law to her that it amounted to fraud upon her and thus induced her to settle. The action was tried before a jury and resulted in a special verdict negativing any fraud, on which judgment for the plaintiff was rendered, from which the defendants appeal.

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The facts were these: *Mrs. Stewart* and her two children (her codefendants) owned a farm with a large amount of stock and other property thereon which *Mrs. Stewart* managed and leased to one Hilleque for a year beginning February 15, 1916, under a complicated sharing agreement. The parties soon disagreed as to the terms and meaning of the agreement and their legal rights thereunder, especially as to the right of the lessee to sell stock. In December, 1916, the plaintiff, by *Mrs. Stewart's* direction, brought an action in equity against Hilleque, claiming that the leasing arrangement made the parties partners, that Hilleque had violated the agreement in many ways, especially in the selling of stock, and asking for the appointment of a receiver to take possession of the personal property. The action was defended by Hilleque, a receiver was appointed who took possession of some at least of the personal property and sold hogs and cream to the amount of $609.24. Some attempts were made to settle the litigation, but they failed. At the end of the leasehold year Hilleque declined to vacate and plaintiff brought unlawful detainer proceedings and obtained judgment of ouster, on which a writ of restitution was issued to the sheriff March 9, 1917. Still Hilleque did not vacate, and the sheriff demanded a bond of indemnity before enforcing the writ of restitution; then Hilleque's attorney made to plaintiff an offer to settle both cases, transfer the personal property, and vacate the farm on payment of $200. The plaintiff called *Mrs. Stewart* to his office and strongly advised settlement. She claims that plaintiff told her that if she did not settle it would cost her $40 to have the sheriff execute the writ and that Hilleque would undoubtedly file a petition in bankruptcy, and in that case she would have to pay Mr. Hilleque $200 anyway. This is the fraudulent misstatement of the law of which the defendants complain, and they claim that *Mrs. Stewart* yielded assent under its influence. It is denied by the plaintiff. The settlement was made, the plaintiff advanced to Hilleque's attorney

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$200, and Hilleque vacated the premises, transferred to the defendants his interest in the personal property, and a stipulation was made that the receiver pay over the money in his hands, $328.70, less $75 for certain expenses, to *Mrs. Stewart,* and that the partnership action be dismissed without costs. The stipulation was carried out, and the court made an order directing the receiver to make the stipulated payments. *Mrs. Stewart* received the balance of the money from the receiver and at once took possession of the farm and the property thereon and leased the same to another tenant. There is no testimony which shows or tends to show that the settlement was not a wise settlement or that the defendants were in any way damaged by it.

J. L. Sherron of Monroe and *R. N. Nelson* of Madison, for the appellants.

W. S. Wadleigh of Galesville, respondent, *in pro. per.*

WINSLOW, C. J. We are satisfied that a verdict for the plaintiff should have been directed. This is not a case of an attorney buying property of or having commercial transactions with his client. He advanced to his client $200 to settle up a troublesome litigation; the settlement was made, the client took the fruits of the settlement and still keeps them; necessarily she cannot avoid the repayment of the advance, the fruits of which she now retains.

Furthermore, the proof is entirely insufficient to prove fraud with that clearness and certainty which the law demands. The evidence is convincing that the settlement was a desirable one. *Mr. Wadleigh* acted as a prudent lawyer desirous of forwarding the best interests of his client. He should not have been compelled to sue to recover his money.

By the Court.—Judgment affirmed.

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STATE EX REL. MURPHY, Respondent, vs. BOARD OF TRUSTEES OF THE TEACHERS' INSURANCE AND RETIREMENT FUND OF WISCONSIN, Appellant.

November 7—December 3, 1918.

Schools and school districts: Teachers' retirement fund: Powers of board: Rules and regulations: Right to annuity: Mistake as to assessments: Deficiency.

1. The limits of and the limitations upon the rights of those claiming benefits under the teachers' retirement act (ch. 42, Stats.) are fixed by that statute, and the board intrusted with the management of the fund thereby created, while it may, under sec. 42.03, reasonably regulate the manner in which and the forms by which such rights may be obtained, cannot restrict or enlarge the rights given by the statute, nor can it lessen or add to the number of those entitled to such benefits.
2. Thus, the statute (in sec. 42.11) having given to "any teacher who may be teaching" in the public schools of this state the right to an annuity after a certain period or periods of service, to be computed as therein provided, and having (in sec. 42.17) defined the term "teacher" as including "all persons legally employed in teaching in the public schools . . . outside of cities of the first class, and all persons legally or officially employed or engaged in superintending, supervising or inspecting such public schools," the board had no power, especially after an application for an annuity had been made by a person coming within said definition and who had otherwise met the statutory requirements, to exclude such applicant by the adoption of a rule that "no credit is given for teaching in our public schools, unless the teacher is regularly employed for at least half-day work."
3. The retirement fund having, under the statute, other sources for its creation and support, the fact that the contributions made to the fund by an applicant for an annuity had for several years been less than the proper amount, due to an error in computation by the city clerk, did not affect her right to have such annuity granted upon the condition that she first pay into the fund the amount required by law (secs. 42.08, 42.11) to make up any deficiency in the total amount paid.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

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The appeal is from a judgment granting a peremptory writ of *mandamus* directing defendant to recognize plaintiff as entitled to an annuity of $325.

On October 7, 1911, the plaintiff, *Kate F. Murphy,* then and for years prior thereto a qualified teacher in the public schools of the city of Menomonie, Dunn county, in this state, made the proper application to come within the provisions of ch. 323 of the Laws of 1911, and on May 22, 1913, gave the required notice of her application for the annuity provided for under the provisions of that chapter, the so-called teachers' retirement act. It was stipulated by the parties that under the conceded facts the petitioner was entitled to full credit for twenty-three years of time under the provisions of the law in question, and the only question litigated was as to whether or not, under the facts as shown of her employment and occupation during the years from 1910 to 1913, there was a sufficient compliance with the law to entitle her to credit for the twenty-five years and therefore to the annuity.

For a considerable period prior to the fall of 1910 *Miss Murphy* taught and had charge of the art work in the public schools of the city of Menomonie, her salary being for some time at the rate of $1,200 and later on $1,400 a year. In the fall of 1910 she was employed as a teacher in the Stout manual training school at Menomonie at a yearly salary from that school of $1,200, and was at the head of its art department and continued in that capacity during that year and the following two years. She was at the same time receiving a salary from the city of Menomonie of $200 per year for each of these years as a teacher and having control and supervision of the art work of the public schools of said city. During the same years the city employed another teacher, Miss Anderson, in the art department of its public schools at a salary of about $360 per annum. The same work was carried on by the joint services of the petitioner and Miss Anderson in the city schools that had theretofore

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been done by *Miss Murphy*. During these years she conducted two classes a day of pupils from the public schools of Menomonie in two periods of fifty minutes each and at the Stout Institute.

By some contract not clearly defined under the evidence in the case before us, between the city of Menomonie and the Stout Institute during these three years, the said city paid the Stout Institute $4,050 per year, and under that arrangement the classes in art of the public schools were to use the art department of the Stout Institute and all the art work of the city schools was to be done there.

Plaintiff's contributions to the retirement fund during these years in question were computed by the city clerk of Menomonie and deducted by him from the $200 paid by the city to her and amounted to $3.96 for the years 1911-1912 and $4 for the following year, instead of the two per cent. on the annual salary she received those years of $1,400. The question of her right to such annuity upon her application was before the defendant board at various meetings between December 20, 1913, and its final action on March 20, 1916, the board then deciding that there was not sufficient evidence to warrant them in giving the petitioner credit for the twenty-five years of service required under the law. These proceedings were instituted in March, 1917.

The trial court held that the rules adopted and relied upon by defendant board as a justification for its denial of the annuity to plaintiff were contrary to the provisions of the statutes, void, and of no effect, and that the petitioner was entitled to the relief for which she prayed upon her paying into the fund $317.04 as required under the statute; and from a judgment entered in accordance therewith the defendant board has appealed.

For the appellant there was a brief by the *Attorney General* and *J. T. Dithmar*, assistant attorney general, and oral argument by *Mr. Dithmar*.

For the respondent there was a brief by *Robert S. Cowie*

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of Whitehall and *Alfred H. Bushnell* of Madison, and oral argument by *Mr. Bushnell.*

ESCHWEILER, J. Ch. 323, Laws 1911, creating what were then known as secs. 460—1 to 460—20, inclusive, now appears, with subsequent amendments, as ch. 42, Stats., secs. 42.01 to 42.18, known as the teachers' retirement act.

Sec. 42.03 provides with reference to the defendant board as follows:

"Said board may adopt rules for the government of its meetings and for membership in the fund, payments thereto and therefrom, and for other matters which will be calculated to aid teachers in securing the benefit of the fund."

Sec. 42.11. "Any teacher who may be teaching in said public schools and who has complied with the provisions of this chapter, may retire and receive the annuity provided for in the following cases:

"(1) After a period or periods aggregating twenty-five years of service as teacher, of which eighteen years must have been spent in the public schools of this state, provided that payments by said teacher to the fund shall have amounted to a sum as provided in section 42.08. If said payments shall not have amounted to said sum, the teacher shall pay into the fund the deficiency before receiving said annuity. . . .

"(3) In computing the terms of service under subsections (1) . . . a year shall be a legal school year at the time and place where said service was rendered, except that where the service was rendered in schools not included within the provisions of this chapter, a time less than a legal school year in this state shall not be included as a year, but only as such proportion of a year as the number of teaching weeks in each such year bears to the number of weeks required at the time to constitute a legal school year in this state."

On May 18, 1912, and subsequent to the date at which petitioner came under said chapter, the defendant board, claiming to act under the provisions of sec. 42.03 above quoted, adopted a rule reading as follows: "Any teacher who

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is regularly employed during the school year as a half-day teacher will receive credit for one-half school year."

On March 28, 1914, and after petitioner's application for an annuity had been made May 22, 1913, the defendant adopted a further rule reading: "No credit is given for teaching in our public schools unless the teacher is regularly employed for at least half-day work. Any teacher doing less than half-day work should not be assessed."

The defendant's refusal to grant the annuity is based upon its contention that inasmuch as it appeared that plaintiff only taught classes from the city schools for two school periods of fifty minutes each per day, and that such one hundred minutes of daily instruction or teaching was less than the amount of time required of other teachers to be done each half day, she failed to meet the requirements of the rules they had adopted and was entitled to no credit under this law for those years.

The statute itself, however, makes no such restriction, and by its language sec. 42.11, quoted above, gives the right of an annuity to "any teacher who may be teaching in said public schools . . . after," etc. By sub. (3) of the same sec. 42.11 the unit for the computation of length of service is made a "legal school year" in domestic schools, and it further provides for the computing of the years spent in outside schools by shortening each such year in proportion as it is less than the school year in this state. But no suggestion of any such shortening process of the school-year unit is made for teachers in Wisconsin schools.

In the absence of anything in the statute to so lessen plaintiff's right, we are satisfied, under the evidence, that she met the statutory requirements for the period involved, for during that time she was legally employed in teaching and officially employed in supervising in a public school in this state. She was therefore a "teacher" within the definition by sec. 42.17, namely, "The term 'teacher' as used in this chapter shall include all persons legally employed in teach-

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ing in the public schools of the state of Wisconsin outside of cities of the first class, and all persons legally or officially employed or engaged in superintending, supervising or inspecting such public schools."

Conceding the wide power and discretion that is vested in bodies like the defendant and the consideration that is always shown for their determinations as to facts coming within the scope of their administration, yet the statute, not the board, fixes the limits of and the limitations upon the rights of those claiming the benefits provided by the statute. The board may reasonably regulate the manner in which and the forms by which such rights may be obtained, but it can neither restrict nor enlarge the rights given by the statute, and it cannot lessen and it cannot add to the number of those entitled to such benefits. *State ex rel. Buell v. Frear,* 146 Wis. 291, 306, 131 N. W. 832; *State ex rel. Adams v. Burdge,* 95 Wis. 390, 70 N. W. 347.

That the plaintiff's contributions to the trust fund during the years in question were based on a percentage upon the $200 per annum instead of the $1,400 she received, is not of much weight here where such fund is not solely dependent upon assessments or payments by those to be benefited. This fund has other sources under the statute for its creation and support, and, besides, plaintiff's right to the annuity she asked was granted by the court below on the proper condition that she first pay into the fund the amount required by law to make up any deficiency in her payments to the fund.

By the Court.—Judgment affirmed.

OWEN, J., took no part.

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GORDON, Administrator, Respondent, vs. ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

November 8—December 3, 1918.

Railroads: Collision at highway crossing: Failure to give statutory signals: Proximate cause of injury: Slight want of ordinary care by injured person: Look-and-listen rule: Questions for jury.

1. Under sub. 6, sec. 1809, Stats. 1917,—providing that a recovery for personal injury or death caused by negligent omission of a railroad company to comply with the requirements of that section shall not be barred by a slight want of care on the part of the person injured or killed—there must be a corresponding relaxation of the rigid look-and-listen rule formerly applied to the traveler on a highway at a railroad crossing.
2. In an action for fatal injuries to plaintiff's intestate caused by collision between his automobile and defendant's train at a highway crossing, the evidence, showing, among other things, that as the deceased approached the crossing his view of the train was partially obstructed by trees, that the train was running at a high rate of speed, and that the statutory warnings of its approach were not given, is *held* to sustain findings by the jury that the failure to ring the bell and blow the whistle was a proximate cause of the injury and that the deceased was guilty of but a slight want of ordinary care.
3. There could be in such case no assumption that the deceased neither looked nor listened for the train; nor, the burden of proving that there was an absolute failure to look and listen being laid by the statute upon the defendant, was the evidence such that the jury was bound to find such absolute failure.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

On Sunday, June 24, 1917, at about 10 o'clock in the forenoon, one Thomas Gordon, Jr., then about twenty-eight years old, at a grade crossing in Dane county, between the stations of Basco and Belleville, was fatally injured by being struck by a north-bound train of defendant. The train approached this crossing from the south over an embankment twelve to fifteen feet high and extending for about

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1,600 feet to the south. The highway made the crossing at an inside angle of about thirty degrees, running from the northwest to the southeast. On the side from which he approached, the northwest, there was an average upgrade of 5.6 per cent. for about 230 feet. A fence or railing was placed on each side of the grade starting about twenty feet from the rail and extending down the grade for about 180 feet, with a space of about twenty feet between them, which space was occupied by the traveled track. A large railroad sign, seven feet long by two feet high, with letters eight inches high, was placed on the railroad right of way on the opposite side of the track from which deceased was coming. Between the portion of the highway on which deceased was traveling and the railroad embankment there were trees scattered over the adjoining pasture along the south side of the highway up to within about fifty-five feet from the track. There were open spaces at several intervals along the highway in a distance of over 300 feet as the traveler approached the railroad, through which spaces, the longest of which appeared to be about thirty-eight feet, a traveler could get an unobstructed view of an approaching train on the embankment. For a space, however, starting at about fifty-five feet from the railroad track and extending back for about 100 feet the trees and foliage were so thick on the south side of the highway that the view of the approaching train was entirely obscured; between the fifty-five-foot point and one thirty-five feet from the track the view was partially obstructed, but for the last thirty-five feet approaching the track the view was clear.

The jury found by the special verdict in substance as follows: (1) there was a failure to exercise ordinary care in reference to the speed at which the engine was running at the time of the collision; (2) there was a failure to ring the engine bell during the approach of the train in the last eighty rods away from the highway crossing; (3) a failure to blow the whistle eighty rods from the crossing; (4) that the fail-

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ure to ring the bell and blow the whistle as thus found was want of ordinary care; (5) that the injury to deceased was the natural and probable result of the want of ordinary care specified in the first and fourth questions; (6) that an injury should have been foreseen from such conduct; (7) that the deceased failed to exercise ordinary care in approaching and crossing the railroad track; (8) that the failure of the deceased to exercise such care was not more than a slight want of ordinary care.

By the eleventh question they assessed the money loss to the widow of the deceased at $4,375, and by the twelfth question assessed the sum of $600 for the physical and mental pain and anguish which the deceased suffered after his injury and up to the time of his death.

After motions by both parties the court directed a judgment upon such verdict for the amount thereof in favor of the plaintiff, and from that judgment defendant appeals.

For the appellant there was a brief by *Jones & Schubring* of Madison, and oral argument by *E. J. B. Schubring*.

William Ryan of Madison, for the respondent.

ESCHWEILER, J. Appellant urges that judgment should have been directed for the defendant in this case substantially on the following grounds: That the familiar rule so often repeated by the decisions of this court in former years, requiring travelers on the highway, when approaching a railroad crossing, to look and listen before crossing, is still in full force and vigor, and that under the facts in this case there was such evident failure on the part of the deceased to make any effort to comply with that rule that, as a matter of law, there was more than a slight want of ordinary care; and further, that in any event the evidence would not legitimately support the conclusion of the jury that the proximate cause of the injury was the failure to ring the bell or blow the whistle.

Unquestionably under the evidence before us in this case

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the deceased did not exercise the ordinary care that the rules of law and the dictates of prudence alike require of a traveler who, knowing of the presence of a railroad track and its rapidly rushing trains, goes upon such track to his injury. That such has been the rule of law in this state is too long and too well established to require any reference to former decisions.

The legislature, however, has within its undoubted province expressed itself upon the subject of highway and railroad crossings by not only providing by statute (sec. 1809 among others) precise methods by which railroad trains must give warning of their coming by ringing of the bell or blowing of the whistle, but in addition thereto provided by ch. 595, Laws 1907, a condition that, when an injury or death was caused by a failure on the part of the railroad to comply with any such statutory requirement, a slight want of ordinary care on the part of the traveler contributing to his injury should not bar a recovery. By amendment in 1909, ch. 332, the burden was placed upon the defendant in such case of proving that any want of ordinary care on the traveler's part was more than a slight want thereof. In 1911, by ch. 653, the term "want of care less than gross negligence" was substituted for "slight want of ordinary care," and in 1915 by ch. 437 the "gross negligence" clause was stricken out and the term "slight want of ordinary care" reinstated, and the statute became as it now stands, and under which the instant case was determined. So, manifestly, a reference to decisions of this court before the amendment above mentioned, or when the statutory requirements were different than as now found, are not helpful in the solution of problems arising under the present statutory provisions.

It is evident the legislature has now marked out a limited field within the field of what formerly was and still is recognized as that of "ordinary care" and designated the smaller field as that which covers situations where the triers of fact can say that, though there was a want of care, yet it was

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not more than a slight want of the ordinary care required and expected of the great mass of mankind under similar circumstances. It is a field as to which we shall not attempt the impossible task of offering any formula which will exactly define and prescribe its boundaries, but it must be left, like so many other questions that arise, to the good sense and judgment of those representatives of the great mass of mankind, the petit jurors.

With the legislative change as to the amount of care, lack of which will defeat an action for injury to the traveler on the highway at a railroad crossing, there must be a corresponding relaxation of the former rather rigid look-and-listen rule. It is sufficient in this case to say that under the present law and the facts herein the trial court was right in his disposition of the case on defendant's motions after verdict in saying that there could be no assumption in this case that the deceased neither looked nor listened for the train, nor was the evidence such, the burden of proof being particularly laid upon defendant to show it, that the jury must find that there was an absolute failure to look and listen.

Under the evidence in this case we also are satisfied, as was the trial court, that the question was one for the jury's determination and they were within the rightful exercise of their powers in answering it as they did. The testimony as to the partial obscuring of the railroad embankment as deceased passed along towards the crossing, the but momentary glimpses afforded of the oncoming train, the question as to whether it was within the range of vision at the precise moments that deceased passed such openings; the fact that there was testimony which the jurors had the right to believe that there was no substantial increase of speed over the ten to fifteen miles per hour the deceased appeared to be traveling in the last two or three hundred feet of his journey and the short space of time required to pass over the last fifty-five or thirty-five feet; the high rate of speed of the train; the failure to give the statutory warnings of its

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approach—all presented a situation from which a jury might say that deceased failed to do that which the ordinary man ought to have done, but nevertheless that such failure to conform with such a standard was but slight. We cannot say that the trial court was clearly wrong in sustaining the verdict. This was not a situation from which the jury or court must say that the deceased knowingly raced with the train and his possible death, which would require now, as well as before the crossing statutes were amended, a denial of any right to recover.

The distinction is plain between this case and those relied upon by appellant of *O'Toole v. D., S. S. & A. R. Co.* 153 Wis. 461, 140 N. W. 293, and *Jay v. N. P. R. Co.* 162 Wis. 458, 156 N. W. 626. In the former the driver of a work team of horses drove ninety feet, with an unobstructed view of the track and with knowledge that a train was then due, and in the second case the injured person had unquestioned knowledge of the then approach of a train. The facts here bring it nearer the situation disclosed and the rulings made in *Wade v. C. & N. W. R. Co.* 146 Wis. 99, 130 N. W. 890, or *Swalm v. N. P. R. Co.* 143 Wis. 442, 128 N. W. 62.

What has been said on the main question involved sufficiently indicates our view of the situation under the statutes to dispose without further comment of the further contention made by defendant that in no event was the failure to ring the bell or blow the whistle a proximate cause of the injury. We are satisfied that the question was properly submitted to the jury in that respect and that the evidence supports the findings.

By the Court.—Judgment affirmed.

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MEADE, Respondent, vs. WISCONSIN MOTOR MANUFACTURING COMPANY and others, Appellants.

November 8—December 3, 1918.

Workmen's compensation: Hernia: Proof required.

1. In compensation cases it may be assumed, as matter of common knowledge, that inguinal hernia is rarely caused by accident, but is generally the result of inherited or acquired weakness.
2. A requirement by the industrial commission that where compensation is claimed in cases of hernia there must be definite proof that the hernia was produced by accident, and to that end that the claimant must prove that the accident was such as could produce hernia, that the hernia appeared immediately after the accident, and that it was followed by pain immediately disabling the claimant, is *held* not unreasonable; and a finding by the commission in this case that the claimant had failed to make such proof is *held* to have been warranted.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This action was brought by the plaintiff to set aside an order of the *Industrial Commission of Wisconsin* dismissing his application for compensation for injuries which he claims to have received in the course of his employment by the *Wisconsin Motor Manufacturing Company.*

While helping to operate an automatic screw machine in the factory of the *Wisconsin Motor Manufacturing Company* the plaintiff claims that, on November 8, 1917, he slipped and received an injury which resulted in hernia.

The *Industrial Commission* found that the evidence did not justify a finding that the hernia was proximately caused by the alleged accident and dismissed the application on the following grounds:

"Inguinal hernias rarely result from accident. They come from inherited or acquired weakness and develop gradually. Because of this, it has been necessary for the *Commission* to require definite proof that the hernia was produced by accident. The applicant must prove that the accident was such as could produce a hernia; that the hernia appeared immediately after the accident; that it was followed by pain immediately disabling the applicant; and that the applicant

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gave immediate notice of the injury to the respondent. We have carefully examined the evidence in this case, together with the written statement of admissions made by the applicant, and we are satisfied that he has failed in his proof. If the applicant had sustained a hernia on November 8th he would have suffered pain and would not have been able to continue with his work for two weeks."

The circuit court, on review of the award, held that the undisputed evidence shows that the alleged accident was the proximate cause of the hernia. Judgment was entered setting aside the order of the *Industrial Commission* and remanding the matter for further proceedings. This is an appeal from such judgment.

For the appellant *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

Albert M. Kelly of Milwaukee, for the respondent.

SIEBECKER, J. The trial court held that the facts presented a clear case of an industrial accident and entitled the plaintiff to compensation, upon the ground that the record disclosed no substantial, credible evidence to support the findings of the *Commission* to the effect that the plaintiff is not entitled to compensation. As shown in the foregoing statement, the *Commission* assumes from common knowledge that inguinal hernia is rarely caused by accident, but is generally the result of inherited or acquired weakness. These facts concerning the cause of hernia seem to be so generally known and undoubted that no proof of them is required. The proceedings in compensation cases sustain the conclusion that this assumption is correct. *Toney v. Williams,* 1 Cal. Ind. Acc. Comm. Dec. 348; *Seiffert v. Milwaukee,* 2 Wis. Workm. Comp. Rep. 66, 67; *Reseburg v. Hamilton M. Co.* 4 Wis. Workm. Comp. Rep. 14, 15; 1 Honnold, Workm. Comp. 294 *et seq.;* Id. 497 *et seq.;* Knocker, Accidents in their Medico-Legal Aspects, 704, 705.

In the light of this general knowledge and experience in dealing with hernia cases, the *Commission* has in practice

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found it necessary, in order to deal justly between persons, to be guided by the following considerations:

" . . . To require definite proof that the hernia was produced by accident; . . . that the accident was such as could produce a hernia; that the hernia appeared immediately after the accident; that it was followed by pain immediately disabling the applicant."

We cannot say that these requirements are not reasonable and essential in determining whether or not hernia is due to accidental injury, nor that the *Commission* wrongfully applied these tests in determining whether or not plaintiff was injured in the course of his employment, as he claims. The *Commission* found that the evidence before them failed to establish that the accident was one that could produce hernia, that the hernia appeared immediately after the accident happened, and that plaintiff immediately suffered pain and consequent disability. An examination of the record has led us to the conclusion that the evidence adduced before the *Commission* presents a state of facts from which different minds might reasonably and fairly draw different conclusions. A consideration of the evidentiary facts in the light of their natural and proper relations consistent with common sense and experience shows that they permit of different inferences in arriving at the ultimate fact as to whether or not the alleged accident was the proximate cause of the hernia of which the plaintiff complains.

This state of the case makes the *Commission's* finding of fact on this issue conclusive under the powers conferred on it by sec. 2394—19, Stats. It is considered that the trial court erred in reversing the order denying plaintiff compensation.

By the Court.—The judgment appealed from is reversed, and the cause is remanded to the circuit court with direction to enter judgment affirming the order of the *Industrial Commission*. No costs to be taxed.

ESCHWEILER, J., dissents.

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STATE EX REL. TOWN OF SOUTH RANGE and another, Appellants, vs. TAX COMMISSION OF WISCONSIN, Respondent.

November 9—December 3, 1918.

Certiorari: Motion to supersede: Appealable orders: Reassessment: Powers of tax commission.

1. A motion to supersede a writ of *certiorari* is in fact a demurrer, and the order thereon is subject to the same right of appeal that applies to decisions on demurrers.
2. The authority of the tax commission, under secs. 1087—45, 1087—51, 1087—57, Stats., to order a reassessment may be exercised in the case of a current assessment, even though the tax roll has been delivered to the treasurer for collection.

[3. Whether it would be an abuse of discretion to order a reassessment, under said statutes, where one or more assessments had intervened, is not decided.]

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

A writ of *certiorari* was issued out of the circuit court for Dane county to review an order of the *Wisconsin State Tax Commission* directing a reassessment of property in the town of *South Range* in Douglas county for the year 1917. The court, upon motion of the defendant, entered an order superseding the writ and the relators appealed.

For the appellants there was a brief by *Luse, Powell & Luse* of Superior, and oral argument by *Claude Z. Luse.*

For the respondent there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

VINJE, J. Lest it be thought the court has overlooked the question whether an order superseding a writ of *certiorari* is appealable we deem it proper to briefly advert to the matter. The office of a motion to supersede a writ of *certiorari* is identical with that of a demurrer to a pleading. *State ex rel. Bidgood v. Clifton,* 113 Wis. 107, 88 N. W.

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1019. So is a motion to quash an alternative writ of *mandamus*. *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 498, 137 N. W. 20; *State ex rel. Standard Oil Co. v. Hull*, *post*, p. 269, 169 N. W. 617. Each challenges the sufficiency of the petition or relation and presents the same question for determination that a demurrer does, namely, Is there a cause of action or ground for relief stated? For that reason such motions are in fact demurrers, though they retain their common-law names, and therefore a decision upon them should be and is subject to the same right of appeal that applies to decisions upon demurrers. By so holding practice is unified, time and expense saved, and the intent of the legislature as to what are appealable orders effectuated.

In the instant case the proceedings for a reassessment were not begun until January 23, 1918. At that time the tax roll had been completed and was lawfully in the hands of the town treasurer for collection, and taxes were being collected. It is claimed by the relators that the *Tax Commission* has no authority to entertain proceedings for a reassessment after the tax roll is delivered to the town treasurer for collection; that while under the amendment of 1911 (ch. 263, Laws 1911: sec. 1087—57, Stats.) the reassessment may be completed after the tax roll has been delivered for collection, proceedings therefor cannot be begun after that date. The correctness of this claim must be determined by the language and intent of the statutes upon the subject. Sec. 1087—45, Stats. 1917, provides:

"Whenever it shall satisfactorily appear to the tax commission upon complaint made by the owner or owners of property in any assessment district, the aggregate assessed valuation of which is not less than ten per cent. of the assessed valuation of all of the property in such district, according to assessment next hereinafter mentioned and a summary hearing in that behalf had, that the assessment of property in such assessment district is not in substantial compliance with law and that the interest of the public will be promoted by a reassessment of such property, said commission shall have authority in their discretion to order a

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reassessment of all the taxable property in such district to be made by one or more persons to be appointed for that purpose by said commission."

Detailed provisions for notice, appointment of a board of persons for making reassessment, procedure, etc., follow, which are not material here. Sec. 1087—51 provides that:

"Upon the completion of the work of such board and the incorporation in such reassessment roll of any corrections and changes ordered by such board, the person or persons making such reassessment shall make and annex to such roll an affidavit conforming as nearly as may be to the affidavit required by law to be annexed to the assessment rolls in such district. Such reassessment roll when completed shall be filed in the office of the clerk of such district and shall take the place of the original assessment made in such district for said year for all purposes and shall be *prima facie* evidence of the facts therein stated and of the regularity of all the proceedings culminating therein."

The portions of the sections above quoted were enacted in 1905 as part of ch. 259 of the laws of that year. In 1911 sec. 1087—57 was added, which so far as here material reads:

"If any such reassessment cannot be completed in time to take the place of the original assessment made in such district for said year, the clerk of the district shall levy and apportion the taxes for that year upon the basis of the original assessment roll, and when the reassessment is completed the inequalities in the taxes levied under the original assessment shall be remedied and compensated in the levy and apportionment of taxes in such district next following the completion of said reassessment in the following manner."

It is urged that the statutes upon the subject evidence a legislative intent that the reassessment proceedings should be seasonably instituted and diligently and speedily prosecuted. This may be granted, but the concession does not solve the question for review in favor of the relators. It is quite evident from the legislation upon the subject that the cardinal thought of the lawmaking body was to provide an

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efficient means of securing just assessments, and that whenever it is made to appear to the *Tax Commission,* in the manner provided by law, that such an assessment has not been made in any assessment district and that the interests of the public will be promoted by a reassessment, then the *Commission* may, in its discretion, order one to be made. It is apparent that before a reassessment can be ordered two facts must be found by the *Commission* to exist: (a) that the challenged assessment is not in substantial compliance with law, and (b) that the public interest will be promoted by a reassessment. When these facts are found to co-exist, then the *Commission* is authorized to order a reassessment. That such authority may be exercised in the case of a current assessment even though the tax roll has been delivered to the treasurer for collection cannot be doubted in view of the amendment made to the law in 1911, quoted above. That specifically provides for the procedure in case the reassessment cannot be completed in time to take the place of the challenged assessment. Proceedings for reassessment begun shortly before the delivery of the tax roll for collection could often not be completed in time to take the place of the assessment roll for that year. Why they should be authorized and not those begun after the delivery of the tax roll is not apparent when both would result in an adjustment of the taxes the following year as provided by the amendment of 1911. Of course the legislature could fix a definite time within which proceedings should be begun, but it has not done so. It has left the matter to the discretion of the *Tax Commission* with the limitation that the public interest must be promoted by a reassessment, otherwise it cannot be had. Whether it would be an abuse of discretion to order a reassessment under these statutory provisions where one or more assessments have intervened we do not decide. This proceeding dealt with a current assessment and came within the discretionary field of the *Tax Commission* as prescribed by law. The legislation in question seeks a just and equal

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distribution of tax burdens and should be liberally construed to effectuate that desirable result.

By the Court.—Order affirmed.

DUNKEL, Appellant, vs. SMITH, Respondent.

November 9—December 3, 1918.

Highways: Collision with automobile: Law of the road: Violation: Contributory negligence: Question for jury.

Where plaintiff, riding southwesterly on a bicycle about four feet from the right-hand curb of a street, was injured in a collision with an automobile which, coming from the northwest on an intersecting avenue, had, in turning to the northeast, cut the corner and come unlawfully upon the left side of the street on which plaintiff was riding, the question of plaintiff's contributory negligence was for the jury, even though his view of the avenue was unobstructed and he knew that vehicles approaching thereon from the northwest had the right of way.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to recover damages for injuries sustained in a collision with defendant's automobile on the morning of September 18, 1916, at the intersection of Mifflin street and Wisconsin avenue in the city of Madison. Plaintiff's evidence shows that Wisconsin avenue is ninety-five feet five inches wide between curbs and Mifflin street sixty-three feet between curbs at their intersection; that the sidewalk on Wisconsin avenue between the curb and the postoffice is twenty-eight feet eight inches wide and on Mifflin street it is twenty-two feet eight inches wide between the curb and the postoffice. Each sidewalk adjoins the postoffice building. Plaintiff was proceeding in a southwesterly direction on the right side of Mifflin street, about four or five feet from the curb, on his bicycle at a speed of about four miles

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per hour just immediately prior to the collision. The defendant was driving up Wisconsin avenue in a southeasterly direction at or near the center thereof, and when he came to the end of the asphalt on Wisconsin avenue, a distance eighteen feet back or northwesterly from the intersection of the northwest curb line of Mifflin street and Wisconsin avenue, he turned to the left and came diagonally somewhat towards the right of the intersection of the northwest curb of Mifflin street and the northeast curb of Wisconsin avenue. The collision took place about four feet southeast of the northwest curb line of Mifflin street extended and about twenty feet southwest of the northeast curb line of Wisconsin avenue extended. The automobile was going at about fifteen miles an hour at the time of the collision.

At the conclusion of plaintiff's evidence the court, upon defendant's motion, entered a judgment of nonsuit, and the plaintiff appealed.

For the appellant there was a brief by *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Harold M. Wilkie.*

For the respondent there was a brief by *Jones & Schubring* of Madison, and oral argument by *E. J. B. Schubring.*

VINJE, J. The trial court held plaintiff guilty of contributory negligence as a matter of law because he knew that vehicles coming up Wisconsin avenue had the right of way as against him, and because there was an unobstructed view of the avenue in time to see and avoid collisions with them. Its decision cannot be set aside unless clearly wrong. We think, however, that in this case the question of plaintiff's negligence was for the jury. Had defendant come on the side of the avenue and Mifflin street which the law required him to come and from which quarter the plaintiff was obliged to look for vehicles, a different question would have been presented. But plaintiff's evidence shows that in turning to the left onto Mifflin street defendant "cut the corner"

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and came onto the left side of the street where he had no right to be; that he was within about four or five feet of the curb line extended when the accident occurred. This would make him over twenty-five feet beyond the center of Mifflin street and on the wrong side. Even if plaintiff saw defendant in the act of turning onto Mifflin street, as he testified he did, when he reached the curb of Wisconsin avenue, the jury might well say that he could not anticipate that defendant would violate the law of the road and come over on his side. We purposely forbear to discuss the situation further because there must be a new trial and the jury must pass on the question of plaintiff's negligence upon all the testimony adduced. This they should be permitted to do without any expression on our part as to whether he was or was not negligent.

By the Court.—Judgment reversed, and cause remanded for a new trial.

FRAILING, Respondent, vs. SIEBER, imp., Appellant.

November 9—December 3, 1918.

Bills and notes: Liability of undisclosed principal: Husband and wife: Evidence as to agency.

1. Under sec. 1675—18, Stats., where a promissory note was signed only by a husband in his own name, an indorser who was compelled to pay the note cannot hold the wife of such maker liable as a principal thereon.
2. Testimony of a husband, who had been separated from his wife, that she knew of his borrowing money and giving his notes therefor on several occasions, and that she not only consented thereto but urged and directed him to do so, was insufficient to show that he gave such notes as her agent or to establish her liability as an undisclosed principal, although such borrowings were all connected with a liability originally incurred for farm machinery bought for use both on his farm and on one owned by her, it appearing, among other things, that she did not consider herself liable for the machinery and had refused to sign the notes with him at the time of the first borrowing.

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APPEAL from a judgment of the circuit court for Shawano county: W. B. QUINLAN, Judge. *Reversed.*

The defendants John Sieber and *Hannah Sieber* are husband and wife. At the time of their marriage *Hannah Sieber* was the owner of eighty acres of land and John Sieber owned twenty-seven acres of land which he farmed in connection with a rented forty. Certain farm machinery was bought which was used in cultivating both farms. Whether the defendant *Hannah Sieber* was liable for any of this farm machinery may be said to be a controverted question. They were eventually sued for the purchase price thereof. They then together went to town, Shawano, saw a lawyer, and arranged a settlement. The defendant John Sieber borrowed $300 from the First National Bank at Shawano and gave his note therefor. This note was renewed once. When the renewal note became due the defendant John Sieber borrowed $300 from the Citizens State Bank of Shawano and paid the First National Bank. The note to the Citizens State Bank was indorsed by a brother of the defendant *Hannah Sieber*. When the note to the Citizens State Bank became due *Hannah Sieber* gave the bank her individual note for $135, and John Sieber borrowed $225 from one Henry Gundorf with which he paid the balance of the $300 note to the Citizens State Bank. When the Gundorf note became due the defendant John Sieber went to the Caroline State Bank and borrowed $250 with which to pay the Gundorf note. The note to the Caroline State Bank, as the others, was signed only by John Sieber. It was indorsed by plaintiff, *John Frailing*. *Frailing* was obliged to pay the $250 note to the Caroline State Bank, and he brought this action against John Sieber and *Hannah Sieber* to recover the amount paid. He seeks to hold the defendant *Hannah Sieber* on the ground that John Sieber signed the note as her agent and that she is liable as an undisclosed principal.

A special verdict was returned by the jury, by which they

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found (1) that *Hannah Sieber* directed and instructed John Sieber to borrow $300 from the First National Bank of the city of Shawano with which to settle up the machinery case; (2) that *Hannah Sieber* authorized and directed John Sieber to borrow the money to pay the note to the First National Bank; (3) that *Hannah Sieber* authorized and directed *John Sieber* to pay the Citizens State Bank; (4) that *Hannah Sieber* authorized and directed John Sieber to borrow money to pay the Genskow (Gundorf) note; (5) that the defendant *Hannah Sieber* purchased the farm machinery in question; and (6) that the separate estate of *Hannah Sieber* benefited by the money which the plaintiff was compelled to pay on the note executed by John Sieber to the Caroline State Bank to the extent of $258.75. Upon this verdict judgment was rendered against the defendants John Sieber and *Hannah Sieber*, and the defendant *Hannah Sieber* appealed.

The cause was submitted for the appellant on the brief of *Dillett & Winter* of Shawano, and for the respondent on that of *Eberlein & Larson* of Shawano.

OWEN, J. It will be noted that the defendant *Hannah Sieber* did not sign the note which was indorsed by the plaintiff *John Frailing* and which he was compelled to pay. Sec. 1675—18, Stats. (negotiable instrument law), provides: "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided." This is a statutory embodiment of pre-existing well settled law. Daniel, Neg. Inst. § 303; 2 Corp. Jur. p. 525; 7 Cyc. 549; 21 Ruling Case Law, p. 895. Speaking of the rule that no party can be charged as principal upon a negotiable instrument unless his name is thereon disclosed, Mr. Daniel, in his work on Negotiable Instruments (5th ed.), § 303, says:

"The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties

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who appear on its face to be bound for its payment; it is 'a courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal party thereto, unless his name in some way is disclosed upon the instrument itself; although upon other written contracts, not negotiable, it is often competent to show that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound. And in such cases he is bound upon them accordingly. The rule excluding parol evidence to charge an unnamed principal as a party to negotiable paper is derived from the nature of such paper, which being made for the purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the original party as the payee himself has, must indicate on its face who is bound for its payment; for any additional liability not expressed in the paper would not be negotiable."

This principle, now embodied in our statutes, evidently overlooked by the trial court in its disposition of the case, is fatal to the judgment against *Hannah Sieber*.

While the judgment must be reversed for the reason already stated, a reversal is necessary for the further reason that there are no facts disclosed by the record justifying a conclusion that in the execution of the various notes John Sieber acted as the agent of *Hannah Sieber*, if in fact that was the effect of the jury's verdict. The defendant John Sieber, who at the time of the trial had separated from his wife and codefendant, *Hannah Sieber*, was a willing witness for the plaintiff, and testified that she was cognizant of the fact that he had borrowed the money on the several occasions mentioned and that he had given his notes therefor; that she not only consented thereto, but urged and directed him to do so. This is the only evidence from which it may be inferred that he was acting as her agent in borrowing the money. It falls far short of establishing the relation of principal and agent. It reveals nothing more than the natural conferences and conversations that might be expected to

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take place between husband and wife under such circumstances, as a result of the confidential relation and unity of interest. It appears, however, very satisfactorily from the evidence that *Hannah Sieber* did not consider that she was liable for the machinery. She not only failed but refused to sign the notes with him, although she was in town at the time he borrowed the first $300. When the $300 note became due at the Citizens State Bank she gave her individual note for $135, which was the price of the binder, and which indicates pretty conclusively that she did not propose to bind herself for the payment of the balance. More than this, when her note for $135 was executed in partial payment for the $300 note in the Citizens State Bank it left but a balance of $165. To pay this he borrowed $225, and when the $225 note became due he borrowed $250, all of which, with interest, the jury finds inured to her benefit, although it appears conclusively that the difference between $165 and $250 must have been otherwise used by the husband, John Sieber. It furthermore appears that she had in the neighborhood of $3,000 in cash, and if this were her individual indebtedness it was unnecessary for her to borrow money and appeal to outside parties for security. If she can be held liable as an undisclosed principal on evidence such as this, it points the way for faithless husbands to dissipate and squander the separate estates of their wives.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint as to the defendant *Hannah Sieber.*

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STILP, Respondent, vs. NEW YORK LIFE INSURANCE COMPANY, Appellant.

November 9—December 3, 1918.

Insurance: Agent's knowledge is knowledge of company: Waiver of stipulation avoiding life policy: Illness of insured when policy delivered: Acceptance of first premium.

1. One who solicits insurance for an insurance company or collects the premiums thereon is by sec. 1977, Stats., made the agent of the company "to all intents and purposes;" hence, when he is doing any act necessary or proper in order to fulfil his agency, his knowledge of the surrounding facts is the knowledge of the company.
2. An insurance company which receives a premium and delivers a policy with knowledge of the existence of facts rendering the policy void by reason of some stipulation of the policy or application to that effect, is estopped from thereafter insisting upon such stipulation.
3. Thus, a provision in the application for a life policy that the insurance should not take effect unless the first premium was paid and the policy delivered to the insured while he was in good health, could not be insisted upon where the agent cashed the check for the first premium and delivered the receipt therefor after he had learned that the insured was ill and had consulted the company's medical examiner (who was treating the insured as a physician) as to his condition.

APPEAL from a judgment of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Affirmed.*

Action upon a life insurance policy. The defense was that the application for the policy contained a provision that it should not take effect unless the first premium was paid and the policy delivered to the insured while he was in good health, and that as matter of fact the insured was seriously ill at that time, which fact was concealed from the company. The action was tried before a jury, and at the close of the evidence a verdict for the plaintiff for the full amount of the policy was directed. The essential facts were not in dispute and were in substance as follows: Clement Stilp, the insured, a boy eighteen years of age and the son of the

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plaintiff, applied for the policy in question and was examined by Dr. Ritchie, the defendant's medical examiner. The medical report was favorable, the application was accepted at the home office, and the policy was sent on to W. A. Clark, the defendant's solicitor of insurance at Appleton, for delivery and collection of the premium. The face of the policy was $1,000 and the annual premium $19.62. One Vaughn, the uncle of the insured and brother of the plaintiff, had offices in the same building with Mr. Clark, and the insured left $8 with him (Vaughn) a week before the arrival of the policy to apply on the premium, promising to pay the balance on his next pay-day. The policy reached Clark on the morning of October 9, 1916, and he gave it to Mr. Vaughn to give to the insured, Vaughn at the same time giving Clark his check on a local bank for the entire premium. Vaughn took the policy to Stilp's house and found him sitting up in bed; he had been under treatment by Dr. Ritchie since October 6th. So far as the testimony shows, the difficulty was at that time supposed by physician and patient to be simply a severe cold. Vaughn delivered the policy to Stilp and saw Clark in the afternoon of the same day and told him that Stilp was at home not feeling well and seemed to have a bad cold, and that the doctor told him to stay in a few days; and Clark inquired the name of the doctor. Clark did not cash the check or deliver to Vaughn the receipt for the premium on that day. On the following day (according to Vaughn's testimony) Clark saw Vaughn and told him he had spoken to Dr. Ritchie concerning the boy's case and Dr. Ritchie told him the boy had a bad cold, so he said there is no use disturbing the policy for the boy will be all right in a few days. Clark died before this action was brought, so that this testimony stands uncontradicted. Dr. Ritchie was called as a witness and testifies to having treated the insured beginning October 6th, but nowhere states the nature of the illness nor does he deny making the statement to Clark above mentioned. On the 10th of October Clark cashed the

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check and gave Vaughn the receipt for the first premium. Stilp remained in the house under treatment for nine or ten days, being in bed about a week of the time. He called at Dr. Ritchie's office for treatment on the 21st, 24th, and 28th of October and was permitted by Dr. Ritchie to return to his work on the 28th. He was a timekeeper for a telephone company and worked until November 4th, when he had a relapse and died November 7th. Dr. Ritchie's statement, which is a part of the proofs of loss, gives as the cause of death "Pneumonia catarrhal, followed by endocarditis with acute dilation," and further states that the insured had pneumonia from October 6th to the 28th, that he had a recovery with perfect health, and had no other disease until "relapse November 4th."

The premium of $19.62 was retained by the company until January 16, 1917, when it sent an agent to plaintiff's house, who handed her $20. She turned the money over to her attorneys, who subsequently placed it in the hands of the clerk of the trial court for the use and benefit of the defendant. The defendant appeals from judgment for the plaintiff on the directed verdict.

For the appellant there was a brief by *Miller, Mack & Fairchild* of Milwaukee, attorneys, and *James H. McIntosh* of New York, of counsel, and oral argument by *Edwin S. Mack.*

For the respondent there was a brief by *Rooney & Grogan,* attorneys, and *George N. Danielson,* of counsel, all of Appleton, and oral argument by *F. J. Rooney.*

WINSLOW, C. J. Two very simple propositions govern this case and demonstrate the correctness of the judgment.

First. Under sec. 1977, Stats., a person who solicits insurance for an insurance company or collects the premium thereon is the agent of the company "to all intents and purposes," *i. e.* he is in fact the company in the specific transactions named in the statute, and consequently, when he is doing any act necessary or proper in order to fulfil his agency,

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his knowledge of the surrounding facts is the knowledge of the company.

Second. An insurance company receiving a premium and delivering a policy with knowledge of the existence of facts rendering the policy void by reason of some stipulation of the policy or application to that effect, is estopped from thereafter insisting upon such stipulation. *Welch v. Fire Asso.* 120 Wis. 456, 98 N. W. 227; 2 Bacon, Life & Acc. Ins. (4th ed.) § 592.

In the present case Clark (*i. e.* the company) did not cash the check nor deliver the receipt for the premium on the 9th, but kept them until the following day, after he had learned from Vaughn of the boy's illness and had consulted the company's medical examiner (who was treating the boy as a physician) as to his condition. Thus he (*i. e.* the company) learned all that any one knew about the facts. Knowing the facts he chose to cash the check, deliver the receipt acknowledging payment of the premium, and run the risk. There was no fraud or false representation. Doubtless the agent could have returned the check and demanded back the policy after he learned of the boy's illness, but he (*i. e.* the company) chose to affirm and complete the transaction and cannot now disaffirm it.

No other questions are necessary to be considered.

By the Court.—Judgment affirmed.

PENN, Respondent, vs. PENN, Appellant.

November 9—December 3, 1918.

Divorce: Denial: Custody of children: Separate support.

Under sec. 2366, Stats., a judgment denying a divorce may award to the wife the custody of the minor children and require the husband to pay a reasonable amount for her and their support living apart from him; and such a judgment in this case is *held* not to have been an abuse of discretion.

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APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

This is an action for divorce brought by plaintiff against the defendant on the ground of cruel and inhuman treatment. The court denied the plaintiff a divorce and found as follows: That the plaintiff and defendant were married as is alleged in the complaint; that the issue of said marriage is correctly described in said complaint; that the defendant has been guilty of a certain amount of cruel and inhuman treatment, which treatment consists more of the nature of causing the plaintiff mental anguish than of violence; that the plaintiff and defendant, through the mutual misconduct brought about by both parties herein and through outside interference, have caused a condition that has made their married life very unhappy, and that said condition has been provoked largely by the fault and misconduct of the defendant.

The court adjudged (1) that the relief prayed for by the plaintiff be denied without prejudice; (2) that the defendant pay to the clerk of the court for use of the plaintiff and her children and for their support and maintenance the sum of $30 per month, the first payment to be made March 1, 1918; (3) that the defendant pay to the plaintiff $125, being the amount necessarily expended by the plaintiff for support pending this action over and above the amount received from the defendant; (4) that the care and custody of the children, John Thomas Penn and Richard Blair Penn, be awarded to the plaintiff, with the right of the defendant to visit them at reasonable times, not exceeding two hours at each time. Defendant appealed from the judgment.

Arthur Goodrick of Antigo, for the appellant.

For the respondent the cause was submitted on the brief of *Eberlein & Larson* of Shawano.

KERWIN, J. The only errors assigned are (1) that the court erred in requiring the defendant to support the plaint-

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iff living apart; (2) that the court erred in giving the custody of the children to the plaintiff.

Sec. 2366, Stats., provides:

"In a judgment in an action for a divorce, although such divorce be denied, the court may make such order for the support and maintenance of the wife and children, or any of them, by the husband or out of his property as the nature of the case may render suitable and proper."

The judgment entered was authorized by this statute. *Voss v. Voss,* 157 Wis. 430, 147 N. W. 634.

The findings set out in the statement of facts are well supported by the evidence. The judgment entered is within the terms of the statute and the amount ordered paid for support of plaintiff and her children reasonable, probably not much if any more than sufficient to suitably support and maintain the two minor children.

No claim is made that the statute is not valid, and the judgment being authorized by the terms of the statute and in strict conformity therewith, and there being no abuse of discretion on the part of the court below, we cannot disturb the judgment.

By the Court.—The judgment is affirmed.

STATE EX REL. STANDARD OIL COMPANY, Appellant, vs. HULL, Secretary of State, Respondent.

November 11—December 3, 1918.

Mandamus: Motion to quash: Appealable orders: Foreign corporations: Annual reports: Fees: Statute construed: "Capital stock."

1. A motion to quash an alternative writ of *mandamus* is in substance a demurrer raising the question of sufficiency of the facts stated in the petition and alternative writ, and the order granting or denying such motion is appealable.
2. The words "capital stock," as used in sub. 7 (e) of sec. 1770*b*, Stats., mean the stock actually issued and paid for, not the authorized capital stock of the corporation.

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APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The petition for the writ of *mandamus* herein recites that the relator and appellant is a foreign corporation organized by the laws of the state of Indiana; that its charter fixes its capital stock at $100,000,000, and that $30,000,000 thereof and no more has been paid for and issued; that for many years prior hereto it has been transacting business as such foreign corporation in the state of Wisconsin and has been licensed by this state so to do; that it has for a number of years past filed an annual report with the secretary of state and received a license to transact business within the state; that in February, 1918, it executed and filed with the secretary of state its annual report and supplemental annual report for the year 1917, under the provisions of sec. 1770*b* of the Wisconsin Statutes, and paid the $2 fee for such filing; that during the year 1917 it owned property within the state of Wisconsin amounting to $4,873,064.79, and transacted business to the amount of $11,713,506.41 in this state; that the true value of all its property, both within and without the state of Wisconsin, during the same year was $126,934,-717.01, and that the total amount of business transacted in the same year both within and without the state of Wisconsin was $169,548,451.22; that it employed during the year 1917 a smaller proportion of its capital stock within the state of Wisconsin than it did so employ during the preceding year; that the defendant, as secretary of state, refused to file such annual reports and threatens to annul the license of plaintiff to transact business within the state on the ground that, as a condition precedent to the filing of said report, the plaintiff must pay a fee therefor based upon the proportion represented by its property and business within the state of Wisconsin of the total amount of authorized capital stock of $100,000,000 instead of the same proportion upon the issued stock of $30,000,000 aforesaid.

The defendant moved to quash the alternative writ of *mandamus* for the reason that neither the petition for nor

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said alternative writ states facts showing the petitioner entitled to a writ of *mandamus* as prayed. From the order quashing the writ the petitioner appeals.

For the appellant there was a brief by *Quarles, Spence & Quarles* of Milwaukee, attorneys, and *C. W. Martyn* of Chicago and *J. V. Quarles,* of counsel, and oral argument by *Mr. Martyn* and *Mr. W. C. Quarles.*

For the respondent there was a brief by the *Attorney General* and *Walter H. Bender,* deputy attorney general, and oral argument by *Mr. Bender.*

ESCHWEILER, J. Although this purports to be an appeal from an order quashing an alternative writ and not from a judgment, nevertheless, the motion to quash being in substance and form a demurrer raising the question of sufficiency of the facts alleged in the petition and alternative writ, it is properly here before us on appeal for the reasons stated in the case of *State ex rel. South Range v. Tax Comm., ante,* p. 253, 169 N. W. 555.

The only question involved on this appeal is as to the definition that shall be adopted and enforced of the words "capital stock" used in sub. 7 (e), sec. 1770*b,* Stats., in determining the amount of the license fee to be paid by petitioner under that statute.

This law (sub. 7, sec. 1770*b*) provides for the filing with the secretary of state of an annual report sworn to by the president, secretary, treasurer, or general manager of the corporation which shall state as follows:

"(a) The name of such corporation and the location of its principal office or place of business without this state, and its place of business or principal office within this state, if maintained.

"(b) The names and addresses of the officers of said corporation, and the name and address of the agent or manager who may represent said corporation in this state.

"(c) The nature of the business transacted in this state during the year preceding.

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"(d) The amount of capital stock paid in money, property or services.

"(e) The proportion of the capital stock represented in the state of Wisconsin by its property located and business transacted therein during the preceding year."

And then follows immediately thereafter the provision containing the words necessary to be defined in this proceeding and reading as follows:

"In determining the proportion of capital stock employed in the state, the same shall be computed by taking the gross business in dollars of the corporation in the state and add the same to the full value in dollars of the property of the corporation located in the state. The sum so obtained shall be the numerator of a fraction of which the denominator shall consist of the total gross business in dollars of the corporation, both within and without the state, added to the full value in dollars of the entire property of the corporation, both within and without the state. The fraction so obtained shall represent the proportion of the capital stock represented within the state. The secretary of state may demand, as a condition precedent to the filing of such report, such further figures, information and statements as he may deem proper in order to determine the accuracy of the reports submitted; the additional information so obtained shall not become a matter of record in the department of state. The corporation shall pay a fee of two dollars for filing such report. In case said reports show that said corporation employs in this state a proportion of its capital stock in excess of twenty-five thousand dollars, said corporation shall pay to the secretary of state, at the time of the filing of said report, an additional fee of one dollar for each one thousand dollars of such excess, except that said corporation shall receive a credit for the proportion of its capital stock already paid for in excess of twenty-five thousand dollars."

The defendant contends that this term "capital stock" in said sub. 7 (e) means the petitioner's authorized stock of $100,000,000; the petitioner, that it means the $30,000,000 of stock paid for and issued.

The substantial difference between the two views is this: the defendant contends for a definition which, by including

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the $70,000,000 of unissued stock, would thereby include the potential or possible future value, that which is not yet and possibly never will be stock, at least so far as stockholders are concerned; the petitioner's definition would confine the term to that which is already created, is already stock both as to stockholders and the corporation. The distinction between the issued and that which is merely within the power of the corporation under its charter to subsequently issue, if it so elects, is well expressed by the following language from the case of *U. S. R. Corp. v. State,* 208 N. Y. 144, 149, 101 N. E. 783:

"The statement in the certificate of incorporation or charter of the corporation that the capital stock is a designated amount divided into a certain number of shares, each of a named value, creates neither shares nor capital stock. It expresses the power of the corporation to acquire a capital stock. It creates potential shares which, transferred into actual shares by the acquisition of members and their payments, produce the money or property which, put into a single corporate fund, is the actual capital or capital stock on which the corporate business is undertaken and in which are the shares."

That the legislature meant in sub. 7 (e), sec. 1770*b*, above quoted, by the term "capital stock" the actual and therefore the issued and paid-for stock, and not the potential or merely embryonic, is, we think, quite apparent from an examination of the statute involved and kindred statutes.

Sub. 7 (d) of this same section, above quoted, requires the foreign corporation to state "the amount of capital stock paid in money, property or services." Applied to this case, the $30,000,000 of issued capital stock is that which would be the proper answer to the requirements of this sub. 7 (d). The $100,000,000 of authorized capital stock would not be.

The same must be said as to the language appearing in sub. 3 of the same statute, regulating the provisions for obtaining the first license to do business in this state by a foreign corporation.

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Unless the requirement of sub. 7 (d) of the amount of paid-up capital stock is for use in the formula given in the following sub. 7 (e), above quoted, for the determination of the amount of license fee, it would seem to be rather an idle ceremony.

It can hardly be presumed, as is suggested by defendant, that this clause is only for the purpose of affording an opportunity to creditors or those interested of readily obtaining the information therein contained, for that object could be more naturally and reasonably attained by slightly amending, if necessary, sec. 1770*a*, Stats., which has been the law, substantially in its present form, since 1883, requiring every foreign corporation actually engaged in manufacturing in this state, upon written demand, to give just such information upon penalty of forfeiture of the right to do business herein.

On the other hand, when domestic corporations are required, under sec. 1774*a*, Stats., to file their annual reports with defendant, they are expressly required to certify as to both kinds of capital stock by the following subdivisions of sec. 1774*a*, viz.: "(3) The amount of authorized capital stock. (4) The amount of capital stock actually paid in money, property and services." It is especially significant that the requirement as to the amount of authorized capital stock is omitted as to foreign corporations, when it is seen that secs. 1770*b* and 1774*a* were put into substantially their present form by chs. 506 and 507, Laws 1905, respectively, and approved the same day, after having gone through the legislature side by side. Where there is such evident intentional omission to refer to authorized capital stock in the section before us, we do not see any warrant for reading it in by implication or construction.

The issued and paid-for stock of petitioner also meets the requirements of sec. 1753, Stats., providing that no corporation shall issue any stock or certificate of stock except in consideration of money or labor or property estimated at its

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true money value, actually received by it, equal to the par value thereof, etc., and which said section also contains the further provision that all stock issued contrary to the provisions of law and all fictitious increase of the capital stock of any corporation shall be void.

In *Thronson v. Universal M. Co.* 164 Wis. 44, 159 N. W. 575, the plaintiff there was denied relief upon a contract involving the issue of capital stock of a foreign corporation for less than its par value, and therefore in violation of the public policy of this state as declared by said sec. 1753; it being held that upon such tainted stock there could be no rights predicated. We feel, therefore, that in construing the term involved here we should favor a definition of it that includes only that which has been clearly defined as legally issued stock by statute and decision, rather than a definition which would go beyond that.

Furthermore, it is evident that the legislature refers to actualities rather than potentialities in fixing the basis for computation of the license fee. All the other elements going into the statutory mathematical computation are actualities. The numerator of the fraction therein provided is the sum of the gross business in dollars of the corporation in the state and the full value in dollars of its property located in the state; the denominator is the sum of the total gross business in dollars of the corporation, both within and without the state, and the full value in dollars of the entire property of the corporation, both within and without the state.

We are also satisfied that the words "capital stock" as here used cannot be meant in the same sense in which they are defined in some decisions as the measure of the assets or property of the corporation, because by this same sub. 7 (e) it is provided that the full value in dollars of the entire property of the corporation, both within and without the state of Wisconsin, shall be used in the computation. The statute therefore provides its own express and different measure of the corporation property.

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This disposition of the case upon the statutes themselves makes it unnecessary to determine whether or not the construction contended for by the learned attorney general in this case would be in conflict with the views expressed by the United States supreme court in holding that the Massachusetts statute exacting, as a privilege for conducting local business in that state, a tax upon the par value of the entire authorized capital, was an unlawful restraint upon property involved in interstate commerce and on property of a foreign corporation located and used beyond the jurisdiction of the state, and therefore void. *International P. Co. v. Massachusetts,* 246 U. S. 135, 145, 38 Sup. Ct. 292.

It follows from what has been said that the trial court adopted the wrong view in his construction of the statute before us, and the petitioner was entitled, under the facts shown in its petition, to have the license issued.

By the Court.—Order reversed, and the cause remanded for further proceedings, without costs, except clerk's fees to be paid by the appellant.

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CASES DETERMINED

AT THE

January Term, 1919.

BECHMANN, Respondent, vs. SALZER, Appellant.

October 10, 1918—January 7, 1919.

Fraud: False statement as to value of corporate stock: Belief of defendant: Degree of proof required: Instructions to jury: Harmless error: Evidence: Relevancy.

1. Where defendant, without knowledge on the subject, assumed to know and stated as a fact, for the purpose of inducing plaintiff to buy certain corporate stock, that it was worth $15 per share, and such statement was untrue, the fact that defendant did not know his statement to be false, or believed it to be true, does not preclude liability on his part as for a deceit.
2. In an action for deceit the burden is upon plaintiff to establish the elements of the fraud by a clear and satisfactory preponderance of the evidence; but the refusal of the trial court so to instruct the jury in this case, and an instruction to the effect that as to certain elements of the alleged fraud the jury must be "satisfied by a fair preponderance of the evidence," are *held* not to have misled the jury or to have constituted prejudicial error, in view of the nature of the evidence and the correct charge given as to the other elements of the alleged fraud.
3. In an action for deceit whereby plaintiff was induced to buy certain corporate stock at a price much higher than its real value, testimony of the secretary of the corporation and the books and trial balances identified by him, showing assets, liabilities, earnings, etc., are *held* to have been material and relevant to the issues.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

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This is an action brought by the plaintiff for money damages, alleging a conspiracy to defraud, and for deceit. The complaint states that the plaintiff, a practicing physician of the city of La Crosse, in July, 1912, acting on the advice of the defendant, bought 100 shares of the capital stock of the U. S. Operating Company for the sum of $1,500, paying $1,000 by check to the U. S. Operating Company, the other $500 being paid to the company by the defendant in consideration of plaintiff's canceling a note on which the defendant owed him $500; that the U. S. Operating Company was in 1912 and is now completely insolvent, such facts being well known to the defendant; that prior to the month of July, 1912, the defendant entered into a conspiracy and agreement with other persons whereby they organized among themselves a company known as the U. S. Operating Company, with an authorized capital stock of $1,000,000; that immediately after such organization the defendant and his associates, George and Henry Salzer, caused to be issued to themselves capital stock of said corporation amounting to $240,000, and that from time to time thereafter and before July, 1912, additional capital stock was issued to defendant and his associates without any consideration; that defendant and his associates sold other stock to innocent parties, among them the plaintiff, and that considerable cash was in this manner paid into the treasury of the U. S. Operating Company, but that all said cash was paid out for salaries, expenses, or squandered in mismanagement.

The complaint further alleges that the plaintiff, who had been for a number of years a close friend of the defendant, told him some time prior to July, 1912, that he would like to invest some of his savings, whereupon defendant induced him to make the above arrangement and investment, representing to plaintiff that he knew about the U. S. Operating Company and that an investment in the same was a safe, conservative, as well as profitable one. Plaintiff further alleges that, in order to deceive him, defendant and his as-

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sociates caused to be declared and issued to plaintiff two cash dividends of $20 each on said stock, whereas the U. S. Operating Company in fact never had any earnings whatever, the so-called dividends being paid out of money obtained from the sale of stock to innocent persons and for the purpose of deceiving the plaintiff, and that in addition a stock dividend of six shares was issued to plaintiff in March, 1913, for the same purpose.

The complaint further alleges that in 1916, when the plaintiff discovered the true status of the U. S. Operating Company, he offered and tendered to the defendant the said certificate of stock and everything that he had received by reason of the transactions hereinbefore set forth, and gave him notice that he rescinded the purchase of such stock and demanded of the defendant that he pay back the sum plaintiff had paid for the stock; all of which tenders, offers, and demands were refused by the defendant.

The answer of the defendant denies that he was in any way connected with plaintiff's purchase of U. S. Operating Company stock; that defendant was at any time an officer in that corporation or that he had participated in its organization or that he ever at any time had any interest, pecuniary or otherwise, in selling such stock to plaintiff.

By special verdict the jury found that prior to the time plaintiff purchased the stock in the U. S. Operating Company defendant represented to plaintiff that the stock was worth $15 a share; that defendant had not theretofore agreed to advise plaintiff in respect to his investments; that defendant represented this stock as being worth $15 a share for the purpose of inducing plaintiff to purchase the stock; that this representation was false at the time he made it, but that plaintiff believed such representation and on the strength of it purchased the stock; that such representation was made as a statement of fact and that defendant did not know it was false at the time he made it; that plaintiff was wanting in the exercise of ordinary care in making the purchase of

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the stock; and that the value of the 100 shares of stock on the day plaintiff purchased them was $100.

Judgment was awarded the plaintiff in the sum of $1,954.66. From this judgment appeal is taken.

Jesse E. Higbee of La Crosse, for the appellant.

For the respondent there was a brief by *Lees & Bunge* of La Crosse, and oral argument by *Geo. W. Bunge.*

The following opinion was filed November 6, 1918:

SIEBECKER, J. Upon the record it cannot be said that the plaintiff's evidence is incredible because it is overwhelmingly impeached by his admission in the complaint and by the documentary and other evidence of the case. The fact that plaintiff's statements on the trial conflict with his former admission, the contents of documents, and former statements is not, under the circumstances shown, sufficient to impeach his evidence as matter of law in the light of his explanations. The court properly submitted the probative force of his evidence to the jury in connection with all the other facts and circumstances of the case.

It is insisted by appellant that the alleged false statements of defendant to plaintiff concerning the value of the U. S. Operating Company's stock at the time of investment, its probable increase in price, and its safety and reliability as an investment, are in their essence and nature mere expressions of opinion and that the parties so understood and considered them. The jury evidently relied on plaintiff's testimony in making their findings that the defendant stated as a fact that the stock was worth $15 a share. Plaintiff's evidence on this point was in part that the defendant stated to him:

" 'I have a good and safe investment for you. I wish you would take some of it. It is worth $15 a share. . . . This is a good investment; it will increase in value in time.' I said that if he said it was good I would take some of it."

The defendant on this point, among other things, testified:

"The doctor asked me what I thought of the U. S. Operat-

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ing Company before he bought the stock. I told him I knew nothing about the company, but I thought it was a good buy. . . . I knew the officers. I had faith in the officers, and on the strength of that I said I thought it was a good buy."

In addition to these positive statements many of the facts and circumstances shown permit of the inference that defendant made representations to plaintiff as a matter of fact concerning the value of this stock and the desirability of buying it as a profitable investment and that such statements were made with intent to induce plaintiff to buy it and that plaintiff relied thereon and was thereby induced to make the purchase. It is, however, strenuously urged that the court erred in holding the defendant liable as for a deceit in the light of the evidence and the jury's finding that defendant did not, in fact, know at the time of such representation that the stock was not worth $15 a share. The argument is made that the evidence shows that the defendant honestly believed that the stock was selling for and was worth this amount. He testified that he had no personal knowledge or information concerning the debts, assets, business, or financial affairs of the Operating Company or what the stock was selling for. He states: "I had no idea of its value. . . . I had nothing on which to base my judgment except my acquaintance with the people." The rule for determining whether these facts justified the court in holding that the element of fraud, constituting a cause of action for deceit, was shown, is clearly stated in the case of *Derry v. Peek,* 14 App. Cas. 337, approved in *Miranovitz v. Gee,* 163 Wis. 246, 157 N. W. 790, as follows:

"Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. . . . If fraud be proved the motive of the person guilty of it is immaterial."

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This doctrine is amply supported by the decisions of this court. Among the recent ones we cite: *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406; *Rogers v. Rosenfeld,* 158 Wis. 285, 149 N. W. 33; *First Nat. Bank v. Hackett,* 159 Wis. 113, 149 N. W. 703.

The trial court is clearly sustained by the record that the defendant, under the facts and circumstances shown, had no grounds for asserting that the stock was worth $15 a share and that it was a good and safe investment. The defendant assumed to know and represented as facts things of which he admits he had no knowledge and which the jury found actually did not exist.

The trial court erroneously refused to instruct the jury, in connection with submitting questions 1 and 6 of its special verdict as requested, that the burden of proof as to these issues rested on plaintiff and that the affirmative thereof must be established "by a preponderance of the evidence so clear and satisfactory as to establish the fact with certainty and beyond reasonable controversy. . . ." The court informed the jury that they must be satisfied by a fair preponderance of the evidence to answer these questions in the affirmative, which is incorrect. The question of proof required as the quantum and degree of proof to establish the affirmative of these questions is stated in the request. The court correctly informed the jury that as to the elements of fraud charged and embraced in questions 2, 3, 4, and 5 of the special verdict the burden of proof was on plaintiff and that to answer these questions in the affirmative they must be satisfied by a clear and satisfactory preponderance of the evidence to so answer them. Why the court instructed the jury differently as to these elements constituting a fraud charge is not perceived. The same rule applies to them all. Can it be said that the jury was misled by this error of the court? We cannot say that the record indicates that they were. The evidence material to the issue of fraud in all its elements is

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so connected that if it is sufficient in probative force and quantum to sustain an affirmative answer to one of the elements as found by the jury, then it naturally suffices to establish the other elements of fraud charged. We are of the opinion that the evidence sustains the affirmative findings of the jury and that the record does not affirmatively show that the jury were misled by the erroneous instruction and hence it cannot be held to have prejudiced the appellant's rights.

The objection that the court erred in receiving the evidence of Mr. Keck, the secretary of the company, and the books and trial balances identified by him, is not well taken. An examination of this evidence discloses that it was proper to show the nature of the company's business and the manner in which it was conducted. This evidence tended to show what the assets, liabilities, earnings, and the cash receipts and disbursements of the company were, as well as the way stock was sold or otherwise disposed of. The evidence was competent and relevant to these inquiries, which were material to the issues presented by the pleadings and required to be determined by the jury.

We find no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

A motion for a rehearing was denied, with $25 costs, on January 7, 1919.

RODER, Appellant, vs. RODER, Respondent.

October 10, 1918—January 7, 1919.

Appeal: Exceptions: Divorce: Division of property: Discretion.

1. In a divorce action a conclusion of law as to the amount which the wife should receive on a final division of property need not be excepted to in order to raise on appeal the question whether that allowance should be disturbed.
2. Wilful desertion of the husband by the wife and misconduct

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on her part are proper to be considered in making a division of property.

3. The rule that, upon a final division of the husband's property, from one half to one third is a proper allowance to the wife is not inflexible. Each case must depend upon its own particular facts and the amount to be allowed rests in the sound discretion of the court.

4. In this case an allowance to the wife of one third of the net value of the husband's property is *held* too large and is greatly reduced.

APPEAL from a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Modified and affirmed.*

For the appellant there was a brief by *Donovan & Gleiss* of Tomah, attorneys, and *Grady & Farnsworth* of Portage, of counsel, and oral argument by *W. H. Farnsworth.*

For the respondent the cause was submitted on the brief of *Naylor & McCaul* of Tomah.

The following opinion was filed November 6, 1918:

KERWIN, J. This is an action for divorce brought by the plaintiff husband against the defendant for desertion. The parties were married March 9, 1898, and this judgment was rendered November 14, 1917. Two children were born to plaintiff and defendant as the fruits of said marriage, a girl and a boy, aged respectively eighteen and sixteen years. The real estate in question was acquired by the plaintiff through inheritance, but the defendant continued to live with the plaintiff on a farm, and performed services as a farmer's wife from the time of marriage up to the desertion alleged in the complaint with the exception of a short time many years prior to the desertion, when defendant left the plaintiff and was afterwards induced to return.

The court below found that the net valuation and amount of the property owned by the plaintiff, real and personal, after deducting debts, obligations, and liabilities of plaintiff,

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was the sum of $14,100, and that the plaintiff was a fit person to have the custody and control of the minor children.

The judgment awarded to plaintiff the care and custody of the children, and upon a final division of property adjudged that the plaintiff pay to the defendant $4,700, the same being one third of the net value of plaintiff's property, and that such amount be received by the defendant in lieu of alimony and as a full and final division and settlement of all property rights, claims, and demands between plaintiff and defendant, and also ordered that the plaintiff pay to the attorneys of defendant the sum of $50 attorney fees and $10 disbursements, in addition to the fees of the clerk of the court.

The plaintiff appealed from the judgment, and the only question raised is whether the judgment as to division of property should be disturbed.

The respondent claims the exceptions are not sufficient to raise this question. There is an exception in the record to the finding as to the valuation of property. This is sufficient. The adjudication as to the amount which defendant should receive on final division is a conclusion of law and no exception thereto was necessary.

The defendant put in an answer in the case, but offered no testimony. The proof offered on the part of the plaintiff showed wilful desertion, also various acts of misconduct on the part of the defendant. It is unnecessary to recite here the acts of misconduct complained of. They were, to say the least, very improper on the part of a married woman and are to be considered by the court on division of property. *Helden v. Helden,* 7 Wis. 296; *Weber v. Weber,* 153 Wis. 132, 140 N. W. 1052; *Varney v. Varney,* 58 Wis. 19, 16 N. W. 36; *Lindenmann v. Lindenmann,* 118 Wis. 175, 176, 95 N. W. 96.

The amount awarded to the defendant upon division was one third of the plaintiff's property. Counsel for respondent contends that under the decisions of this court the allowance

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made to the defendant should not be disturbed. It is true this court has held that from one half to one third is a proper allowance. *Hiecke v. Hiecke,* 163 Wis. 171, 157 N. W. 747. The rule, however, is not inflexible. Each case must depend upon its own particular facts, and the amount awarded rests in the sound discretion of the court in view of all the facts and circumstances in the case. *Gauger v. Gauger,* 157 Wis. 630, 147 N. W. 1075; *Lindenmann v. Lindenmann, supra.*

In this case the court is of opinion that the amount awarded to the defendant was too large and that it should be reduced to $2,000.

By the Court.—The judgment of the court below is modified by changing the judgment where it provides for payment of $4,700 by plaintiff to defendant on division of property to $2,000, and as so modified the judgment is affirmed as of the date thereof. No costs are allowed on this appeal, except that respondent pay the clerk's fees.

A motion by the respondent for a rehearing was denied, with $25 costs, on January 7, 1919.

AMBLER, Respondent, vs. SINAIKO and others, Appellants.

December 3, 1918—January 7, 1919.

Sales: Successive orders as parts of one transaction: Refusal to pay instalments: Future deliveries: Termination of contract.

1. Successive orders for coal given by retail dealers and formally accepted by a wholesaler having been, in the correspondence and accounts of the parties, always considered and treated as being simply items in one continuing transaction, and no contention that they were separate contracts from which separate rights arose having been made at the trial of an action involving a claim of nonpayment and counterclaims of nondelivery, this court, in which that contention is made for the first time on appeal, treats such accepted orders as the parties treated them, not as independent contracts, but as a sale of goods with delivery as well as payment to be made in instalments.

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2. In such case, under the uniform sales act (sub. 2, sec. 1684*t*—45, Stats.), the failure of the retailers to pay an instalment when due, together with their refusal to pay any further instalments until all the coal contracted for had been delivered, although much of it was not yet due to be delivered, justified the wholesaler in refusing to make further deliveries.
3. Where one party to an executory contract deliberately declares that he will not perform on his part, the other party may at his option treat the contract as terminated.

ESCHWEILER and OWEN, JJ., dissent.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action by the plaintiff, a wholesale dealer in Illinois coal at Chicago, to recover of defendants, who were retail dealers at Madison, a balance of about $1,200 alleged to be due on purchases of coal between July 10 and October 31, 1916.

The defendants by answer admitted the indebtedness claimed, but interposed three counterclaims for failure to deliver coal under three certain contracts, and claimed damages amounting to nearly $2,500.

The action was tried by the court. It appeared by the evidence that the parties had dealt together for some months prior to the transactions in issue; that orders were given from time to time, sometimes orally, sometimes by mail, and sometimes by telephone; some were accepted orally and some by letter, while the larger orders, which were not to be entirely filled at one delivery but in carload lots from time to time as wanted, were generally accepted by a formal acknowledgment stating the amount and kind of coal ordered, the price per ton, the place of delivery, the railroad route, and the time during which the shipments were to be made, with a memorandum of terms as follows: "Terms: Cash, not later than 20th of the month following shipment." The printed statements of account used by the plaintiff (as appears from one introduced in evidence) bore the following statement at the top: "Terms: Cash on or before the 15th for shipments of the previous month." There is no direct evidence that this agreement as to the time of pay-

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ment was specifically made every time an order was made, but there seems to be no dispute but that both parties understood that payment for the shipments of any month was due at least by the 20th of the following month. A letter from the plaintiff to the defendants of November 10, 1916, states that all sales were made on the explicit understanding that settlement was to be made on the 10th of the following month, and this statement does not appear to have been challenged by the defendants.

The defendants' counterclaims were based upon the alleged failure of the plaintiff to fill three of the larger orders above mentioned, made respectively June 5, September 11, and September 19, 1916. The first of these orders was for twelve cars Franklin county stove coal and six cars of Franklin county lump, and the same was accepted by one of the formal acknowledgments above mentioned specifying that shipment was to be made "during June to March, 1917." The second order was for five cars of Pocahontas mine-run coal, and was accepted by letter specifying that one or two cars were to be shipped as soon as the mines could care for them and the remaining three "as ordered by you between date and next April 1st," The third order was for twelve cars White Star lump coal, and was accepted by one of the formal acknowledgments aforesaid specifying that four cars were to be delivered in September, "balance as ordered."

It appears by the evidence that the six cars of Franklin county lump named in the first order were delivered in August, 1916, and that on the 31st of that month one car of Franklin county stove was delivered, and that no more was ever delivered on that order. No cars were ever delivered under the second order. Eight cars were delivered under the third order in September and October, the last delivery being October 18th. So the failures to deliver for which damages are claimed by the defendants are eleven cars under the first order, five cars under the second order, and four cars under the third order. The plaintiff claims, by way of defense to

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the counterclaims, that in the latter part of October the defendants ordered him to ship no further coal until it was specifically ordered, whereupon he ceased shipping coal, and that on the 20th day of November the defendants breached their contracts by failing to pay for the coal delivered in October and prior thereto, and that for this reason he refused to go on with the contracts. As to the second counterclaim the plaintiff further claims that the contract was canceled by the substitution of another kind of coal therefor and that he was afterwards directed by defendants not to ship the same. The book accounts kept by the parties since May 4th were in substantial agreement; two cars were shipped in May, aggregating $154.94, for which defendants paid July 8th; two cars were shipped in June, aggregating $122.45, for which defendants paid August 14th; eleven cars were shipped in July and August, aggregating about $700; in September fourteen cars, aggregating about $950; in October eighteen cars, aggregating about $1,950; and on November 16th two cars of coke, aggregating $192.40. No payments were made in August; September 8th $400 was paid, October 15th $500, November 4th $1,000, and November 14th $600. In the latter part of October the plaintiff made frequent requests for additional payments and the defendants made the payments above set forth, amounting to $1,600, in the first half of November, but still leaving over $1,000 unpaid on the account for coal delivered before November 1st. On November 21st plaintiff wrote requesting a check for the balance of this account and threatening to draw through the bank if he did not receive it, and on the 22d wrote that if the check was not received by the 25th of the month the account would be put in the hands of attorneys for collection. On the 22d the defendants caused the following letter to be sent to the plaintiff by the president of the First National Bank at Madison:

"Your letter of the 21st inst., addressed to Sinaiko Bros., has been brought to our attention, and we are writing you

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today at their request to state that they have this day deposited with us $1,000 to be remitted to you when you have made shipment of the remaining coal which they allege is due them under their existing contracts.

"They indicate that they are still entitled to the following shipments:

"Five (5) cars Pocahontas mine-run;

"Eleven (11) cars Franklin county No. 2 nut;

"Four (4) cars White Star lump.

"They appear to have contracted for this coal and consider that they will be seriously damaged if same is not forthcoming without further delay.

"We shall be glad to hear from you with any suggestions you may have to offer on the subject. We desire to say that we have entire confidence in these people and believe they are in a position to meet their obligations in a consistent manner if the coal is furnished to the extent indicated."

To this letter plaintiff replied to the defendants on November 23d, stating among other things that unless a check for the amount due up to November 1st was received by November 27th they should consider "your contract for future shipments" canceled and suit would be instituted at once.

The court found that the contracts were made as stated, that the defendants never released them, and that the contracts by their terms required payment for all coal shipped not later than the 20th of the following month; also

"That plaintiff shipped all coal ordered by defendants under either of the said three contracts until the middle or latter part of October, 1916, when defendants directed the plaintiff to ship no more coal under these three contracts until it was ordered by the defendants; that thereafter and during the first half of November, 1916, the defendants ordered the plaintiff to ship two cars of Franklin county coal under the contract of June 5, 1916, and three cars of lump coal under their contract of September 19, 1916; that before plaintiff was required to ship further coal under the three contracts found above, the defendants breached their part of these contracts by failing to make payments as required by the terms of said contracts.

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"That plaintiff, prior to November 20, 1916, notified defendants that they must comply with the provisions of the contract requiring payment by the 20th of the month.

"That defendants breached their contract by failing to pay on November 20, 1916, for the coal delivered prior to November 1, 1916."

The court also found that the defendants ordered five cars of coal during the first half of November (before their default in payment of November 20th), which the plaintiff failed to deliver, and that defendants were entitled to recover $289.50 for such default, which sum the court deducted from the plaintiff's claim and rendered judgment for the plaintiff for the balance due. From this judgment the defendants appeal.

Charles G. Riley, attorney, and *Elmore T. Elver,* of counsel, both of Madison, for the appellants.

For the respondent there was a brief by *Tenney, Tenney & Reynolds* of Madison, and oral argument by *E. J. Reynolds.*

WINSLOW, C. J. The findings of the court to the effect that in October the defendants ordered the plaintiff to stop all shipments of coal until further orders, and that during the first part of November they ordered two cars under the first contract and three cars under the third, which were never delivered, and that no further orders to ship were given before November 20th, when defendants declined to pay and thus (as plaintiff claims) breached the contracts, are sufficiently supported by evidence and cannot be disturbed.

But the defendants claim that, even conceding these findings to be true, there was no default on the first contract because it was a separate and independent contract, that only one carload of coal had been delivered under it, and that on August 31st the defendants' payments of $400 in September and $500 in October more than paid for all the coal delivered in July and August, and hence that there was

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nothing due on this contract in November and no breach by the failure to pay at that time.

This contention seems now to be made for the first time. We discover no traces of it in the trial record. The great difficulty with it is that it is quite clear that the parties themselves never treated their transactions as separate transactions, but all as one continuing and continuous deal. Both parties kept their books in that way. Their accounts were simply running accounts upon which payments were made from time to time, not to be applied to any particular shipment or contract but upon the account generally. The so-called separate contracts were considered and treated simply as parts of the general deal, as items in one continuing transaction. The correspondence shows that no claim of separate contracts or of rights arising therefrom was made even when the plaintiff was most insistent in his demands for payment of the whole October balance on November 20th. When the letter sent on behalf of the defendants by their banker on November 22d was written there was an excellent opportunity to make this claim with force, but it is clear that there was no such thought. Had they then said to the plaintiff, "You contracted to sell us twelve cars of stove coal, you have sent but one, for which we have paid, we are not in default on this contract, and we demand that you continue to ship coal under it notwithstanding our failure to pay under other contracts," the proposition might have been difficult for the plaintiff to meet; but it is evident from that letter as well as from other letters in evidence and the accounts kept by the parties that the formal contracts were regarded by both parties as incidents of one long transaction, rather than as separate transactions by themselves, as orders rather than as independent contracts. We know of no reason why they should not now be treated as the parties chose to treat them, especially when the contention is first made in the court of last resort.

Treating the case on this basis, we have a case of sale of

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goods with delivery as well as payment to be made in instalments, and we squarely meet the question whether defendants' failure to pay the amount due on November 20th justified the plaintiff in declining to make any further deliveries, or whether the plaintiff was required to go on and fill its contracts notwithstanding defendants' default.

On this question the authorities are not in entire accord. For a review of the cases see *Quarton v. American L. B. Co.* 143 Iowa, 517, 121 N. W. 1009, 32 L. R. A. N. S. 1, and note. In this court see *Campbell & Cameron Co. v. Weisse,* 121 Wis. 491, 99 N. W. 340, also *German American Bank v. Webster M. Co.* 144 Wis. 314, 128 N. W. 48. In this state the matter is now unquestionably governed by the uniform sales act (sub. 2, sec. 1684*t*—45, Stats.), which provides in substance that, where there is a contract for the sale of goods to be delivered and paid for in instalments and there is a defective delivery of or failure to pay for an instalment, the question whether the breach is so material as to justify the injured party in refusing to go on with the contract and suing for his entire damages at once depends in each case "on the terms of the contract and the circumstances of the case."

Applying this rule to the present case, there seems to us to be no doubt that the refusal of the defendants to pay the amount due on November 20th was so material as to justify the plaintiff in his refusal to make further deliveries. A mere neglect to pay an instalment for a time might not be sufficient, but here there was more. As we read the letter of November 22d, it was a plain refusal to make any further payments on coal until *all* the coal contracted for had been delivered—although much of it was not yet due to be delivered. That the plaintiff so understood the letter there can be no doubt. This is clearly shown by his reply of November 22d, in which he says:

"We are this morning in receipt of a letter from the First National Bank of Madison, Wisconsin, advising that you

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have deposited $1,000 with them to be remitted when we ship you five cars of Pocahontas mine-run coal, eleven cars of Franklin county coal, four cars of White Star lump coal."

Later in the same letter the plaintiff says:

"The money you owe us is long past due, and now you propose, not to give it to us so we can use it in our business, but to deposit it where it is of no use to us, and hold it out on us until possibly April 1st."

This shows that the plaintiff construed the letter as a refusal to pay any further monthly instalments until all the coal had been delivered under all the orders.

So far as appears from the evidence the defendants never notified the plaintiff that he had construed the letter of November 22d wrongly; apparently they were content to have it so construed. This was practically a repudiation of all provisions of the contracts requiring payments in monthly instalments. It was not mere neglect or refusal to pay one instalment, but a refusal to be bound by one of the material provisions of the contract in the future while insisting on full performance by the plaintiff. Such a breach must be regarded as a material one, which justifies refusal to further perform on the part of the other party.

There is another well established principle which seems decisive of the case, namely, the principle that, where one party to an executory contract deliberately declares that he will not perform on his part, the other party may at his option treat the contract as terminated. *Woodman v. Blue Grass L. Co.* 125 Wis. 489, 103 N. W. 236, 104 N. W. 920. That is, in effect, what the defendants did here when they declined to pay anything until all of the coal had been delivered.

By the Court.—Judgment affirmed.

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ESCHWEILER, J. *(dissenting)*. In this case there is no evidence of the parties ever having, at any one time, made any agreement as to their subsequent dealings and fixing their respective rights and liabilities. The orders are all separate and independent, never referring to others or to any prior arrangement, with different provisions as to price, quantities, and times of delivery, and some differences as to times of payment; the plaintiff asserting at times that payments are to be on the 10th, the 15th, or the 20th, respectively, of the month following deliveries, and all particular provisions as to times of payments had at times been waived.

I think these orders were separate and independent contracts as a matter of law, and that the method of payments from time to time did not alter their legal character.

Evidently a cancellation of or refusal to accept under any one order by defendants could not legally have justified plaintiff in refusing to ship under other then outstanding orders.

In Mr. Proudfit's letter of November 22d stating the deposit of the $1,000, he expressly refers to shipments "due them under their existing *contracts*." This would seem a fairly reasonable notice to plaintiff that what he, plaintiff, considered merely separate orders in the course of one transaction, were, in the estimation of defendants, of the dignity of separate contracts. There were either orders under one contract or separate contracts. I think the defendants through Mr. Proudfit notified the plaintiff concisely and accurately that they claimed rights under several independent contracts.

The letter of plaintiff of November 23d, declaring his intention to call all transactions at an end, was written at a time of a rising market, as would appear from the testimony and findings herein, even without resort to common knowledge as to the then situation. This fact, I think, is entitled to great weight in considering the acts of the parties. In this letter plaintiff expresses his surprise upon three grounds,

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and those, with the statement that there was then due and unpaid $1,011.38 (only $11.38 more than the deposit with the Madison bank), are the only grounds upon which it can be claimed from the letter itself he based his right to refuse to make any further shipments; and these grounds, which were also asserted by plaintiff in his verified reply, were as follows: (1) That the order for five cars of Pocahontas had been canceled by defendants. This assertion was found by the court to be false. (2) That the order for four cars of White Star had also been canceled by defendants. This assertion was also found by the court to be false. (3) That the eleven cars of Franklin county coal demanded by defendants were part of an order of eighteen cars, of which eleven had been shipped, leaving nine instead of eleven, and this order was subject to delivery between June, 1916, and March 31, 1917, and that there remain four months to complete the order, and in effect claiming that he had until the end of that period to hold all deliveries.

By this letter, therefore, plaintiff expressly repudiated any obligation to ship either of the respective orders of five cars of Pocahontas and four cars of White Star for reasons which the court has found were not supported by the facts and therefore false, and in effect claimed the right to withhold delivery on the other.

If the transactions between the parties were in effect one contract, as held by the majority, then there seems here to have been a positive, definite declaration, based upon mistake if not falsehood, of a refusal of recognition of a substantial part of such contract and such as would warrant defendants to consider it an intention by plaintiff to abandon the contract. It should be noted that nowhere in this letter does plaintiff consent, even if the $1,011.38 is paid, to recognize any rights in defendants under either of these two orders.

Under any consideration of the relationship between the parties I think it is evident that the defendants had the right to demand delivery of some if not all of these several orders

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and to have until the 20th of the month following delivery to pay for the same. The plaintiff took the position, however, that there were no such orders in existence any longer. If the defendants ought to have immediately answered this peremptory letter of plaintiff and explained any misunderstanding, if such there was as to whether plaintiff was correct in surmising that the money was to be withheld until April 1st, the same rule would require plaintiff to promptly notify defendants, and before the time limit set of November 27th had expired, that if defendants did pay they would be recognized as having rights under these two orders.

That the breach must be substantial to warrant a seller in taking the position assumed by plaintiff is the law of this state by the statutes and decisions cited in the majority opinion.

Many authorities hold, and with good reason, that there must be a further showing of intention to abandon a contract. *West v. Bechtel,* 125 Mich. 144, 84 N. W. 69; *Welsh v. Michigan M. Co.* 161 Mich. 16, 125 N. W. 692; *Empire R. M. Co. v. Morris,* 77 N. J. Law, 498, 72 Atl. 1009; *Quarton v. American L. B. Co.* 143 Iowa, 517, 121 N. W. 1009, 32 L. R. A. N. S. 1.

If the amount of coal to be delivered as indicated in Mr. Proudfit's letter was unreasonable in view of any contingencies of transportation or mining, or for any reason, the plaintiff in honesty and good faith should have said so. The mere making of an unwarranted claim for performance during the life of a contract is not such a breach as would warrant cancellation. *Nat. C. Co. v. Hudson River W. P. Co.* 192 N. Y. 209, 216, 84 N. E. 965; 13 Corp. Jur. 658.

The tone of Mr. Proudfit's letter inviting, not repelling, suggestions from plaintiff on the subject, the deposit of the $1,000, more than the amount ($914.28) ultimately found due the plaintiff, the demand for more coal under the orders, absolutely inconsistent with an intention to abandon; the rising market under which the defendants would so nat-

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urally and reasonably hold onto rights secured to them at prices lower than then existing; and on the other hand the absolute repudiation by plaintiff of any liability as to the then existing valid orders on mistaken if not false grounds; the rising market where plaintiff would profit by breaching his obligation, all presented such a situation that I think the court should have said that the plaintiff was in default and liable.

I am authorized to state that Justice OWEN concurs in this dissent.

KEACHIE and another, Respondents, vs. STARKWEATHER DRAINAGE DISTRICT, Appellant.

November 8, 1918—January 7, 1919.

Drainage: Contracts: Validity: Making decision of commissioners final: Acceptance of ditches on completion: Waiver of requirements in specifications: Duty of contractor: Inspection of work: Intermediate payments: Statements as to satisfactory performance: Estoppel: Failure to complete work on time: Penalty or liquidated damages.

1. In a contract with a drainage district for the excavation of certain ditches a provision that "in the interpretation of these specifications and the contract and upon all questions concerning the execution of the work the decision of the [drainage] commissioners shall be final," is valid and confers upon the commissioners the same powers as are conferred upon architects by similar provisions in building contracts.
2. Findings by the commissioners in such case, after completed performance is claimed, as to the amount of excavation still necessary and as to other delinquencies on the part of the contractors, are final, binding, and conclusive unless impeached for fraud or for mistake so gross as to amount to constructive fraud.
3. The vesting in one of the parties to an executory contract of the power to decide finally all questions that may arise as to the contract, specifications, or execution of the work is not condemned by public policy any more than is a contract which is to be performed to the full satisfaction of one of the parties. In either case there must be the exercise of honest judg-

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ment, and the party performing the contract cannot be denied the fruits thereof by fraudulent, arbitrary, or capricious action on the part of the other.

4. When the parties to an executory contract stand upon an equal footing and intelligently and deliberately provide therein for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, the contract should stand and the parties be made to abide by it and by the judgment of the tribunal of their choice; and the question whether it was a wise or provident contract is not material.
5. A provision in a drainage contract that "no ditch or lateral shall be finally accepted until completed for its entire length, and . . . the contractor shall keep such ditch or lateral in good condition or repair at his own expense until it is finally accepted by the commissioners," did not require the commissioners to accept each ditch or lateral upon its completion, such an intent not being shown by any other provision in the contract and being negatived by the conduct of the parties.
6. Where a contract required that drainage ditches be dug to a one-to-one slope on the sides, the fact that the contractors, who found it necessary to use a floating dredge, explained to the commissioners that with such dredge the ditches could not be dug to the required slope but that by digging them wider and deeper than the contract called for the sides would in time cave in and thereby give the proper slope, and the fact that the commissioners permitted him to proceed in that way, did not show a modification of the contract or a waiver of the requirement of a one-to-one slope.
7. Where one contracts to do a certain thing in a certain manner and in accordance with certain specifications it is his duty to make his work comply with the contract and specifications unless, by a provision for inspection or otherwise, he is relieved from that duty by the terms of the contract itself.
8. Under a drainage contract intermediate payments were to be made each month, based upon approximate estimates of work performed during the preceding month. Such payments were to be a certain percentage of the contract price "for the work that shall be completed to the satisfaction of the commissioners." The contract did not provide for inspection of the work, and in practice the estimates were approximated by ascertaining the distance dug during the month, without any attempt to measure accurately the other dimensions of the ditches. Such measurements were in fact impracticable, owing to the manner in which the digging was done. *Held*, that by making the intermediate payments the commissioners did not waive their right to object that the work was not done

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according to the plans and specifications, even though they had from time to time called the contractors' attention to certain irregularities in the work which were manifest upon casual observation. *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, distinguished.

9. Neither a statement, in an annual report by the commissioners to the circuit court, that work according to the plans was progressing in a satisfactory manner except as to the rapidity with which it was being done, nor a stipulation, made by all parties upon a renewal of the contractors' bond, to the effect that up to that time the contract had been satisfactorily performed in accordance with its terms, except as to the time for completion, operated as a waiver or an estoppel with respect to the right of the commissioners to assert that work theretofore done was not in accordance with the plans and specifications, there being no evidence that the contractors knew of said report or were in any manner influenced by it, or that the stipulation in any way affected their subsequent conduct, and it affirmatively appearing that they did not construe either document as an expression of the commissioners' satisfaction with the work already completed or as indicating an acceptance thereof.

10. Provisions in a drainage contract that for so much of certain specified quantities of the excavation as should not be completed at specified dates the contractors should in each case forfeit "as liquidated damages" a percentage (varying from ten to twenty per cent.) of the contract price for the performance of the excavation so remaining uncompleted in each particular instance at the date specified, are construed as calling not for penalties but for liquidated damages, there being nothing to indicate that the parties did not so intend and the situation being such that a computation of actual damages would be extremely difficult.

ESCHWEILER and VINJE, JJ., dissent in part.

APPEAL from a judgment of the circuit court for Dane county: CHESTER A. FOWLER, Judge. *Reversed.*

The defendant is a drainage corporation, comprehending certain territory in Dane county, Wisconsin, contiguous to the city of Madison. On or about the 16th day of November, 1911, the plaintiffs entered into a contract with the said drainage district to dig a system of drainage ditches, consisting of two main ditches and various laterals. The main

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ditches were known as the East main and the West main. By the terms of the contract the work was to be completed by the 1st day of January, 1913. The work was not completed by that time, and on the 3d day of February, 1913, a new contract was entered into by the terms of which the work was to be completed January 1, 1914. The work was to be done for a unit price per cubic yard for earth and material removed. The purpose of the new contract was to extend the time within which the work was to be completed. Its terms were identical with those of the first contract, except that in the second contract occur these provisions:

"It is further understood and agreed that said parties of the second part shall have completed the excavation of not less than 75,000 yards of the material now remaining unexcavated under said contract on or before July 1, 1913, and that for so much of said 75,000 yards as such remain unexcavated on July 1, 1913, the said parties of the second part shall forfeit as liquidated damages ten per cent. of the contract price for the performance of said excavation so remaining uncompleted. And that they shall fully complete the excavation of 150,000 yards of the materials now remaining unexcavated by the 1st day of October, 1913, and that for so much of said 150,000 yards as shall remain unexcavated on October 1, 1913, the said parties of the second part shall forfeit as liquidated damages an amount equal to fifteen per cent. of the contract price for the performance of said excavation so remaining uncompleted.

"In case said contract and all work should be performed and labor and material to be furnished thereunder, shall not be completed or done by January 1, 1914, then for all work remaining uncompleted on January 1, 1914, the said contractors shall forfeit as liquidated damages, not as a penalty, to said commissioners, an amount equal to twenty per cent. of the estimate cost of that portion of the work then remaining uncompleted."

By the terms of both contracts the ditches were to be dug to a one-to-one slope on the sides. It transpired that a floating dredge was necessary to dig a considerable proportion of the ditches. The contractors claimed that it was impos-

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sible to give the sides of the ditches a one-to-one slope with a floating dredge. They explained this to the commissioners and said that the best they could do was to dig the ditches wider and deeper than called for in the contract, assuring the commissioners that in course of time the sides of the ditches would cave in from natural causes and thereby give the ditches the slope required. The ditches were so dug.

The contract or specifications contained the following provision: "In the interpretation of these specifications and the contract and upon all questions concerning the execution of the work the decision of the commissioners shall be final."

The contractors claimed to have completed the work on or about July 15, 1915, and that pursuant to the contract price for the yardage removed they had earned under their contract $28,345.59, of which sum $20,665.81 had been paid, leaving a balance due and owing the contractors of $7,679.75. They also claimed compensation for additional items, bringing their total claim to $8,110.83.

The defendant claimed that the plaintiffs had not completed their contract. The commissioners found that there was still 38,480 cubic yards necessary to be excavated to make the ditches conform to the contract, refused to pay the plaintiffs the amount demanded by them, and this action was begun. Defendant counterclaimed for damages resulting from the alleged failure of plaintiffs to complete the contract and for $2,163.04 liquidated damages for failure to complete on time.

The trial court held that the provision of the contract that "In the interpretation of these specifications and the contract and upon all questions concerning the execution of the work the decision of the commissioners shall be final" was void and of no effect; that the ditches had been excavated in a manner to comply with the terms of the contract, except 10,000 yards which remained unexcavated in the West main. It was also found that certain dirt on the edges of the ditches remained to be removed. A deduction of $1,800 from the

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claim of the plaintiffs was allowed for excavation of the yardage and $75 for the removal of the dirt. The provision in the contract providing for forfeitures in case the work was not completed on time was construed to be a penalty, and $1,000 was allowed and deducted from the claim of the plaintiffs. Other small items in controversy were passed upon by the court, some of which were allowed, and judgment was rendered in favor of the plaintiffs and against the defendant for $4,646.80, with interest from July 1, 1915, and costs. From the judgment so entered the defendant appealed.

For the appellant there were briefs by *Buell & Lucas* of Madison, and oral argument by *Frank W. Lucas.*

For the respondents there was a brief by *Hill & Spohn* of Madison, and oral argument by *W. H. Spohn.*

OWEN, J. The question of ranking importance is whether the court erred in reading out of the contract the provision that "In the interpretation of these specifications and the contract and upon all questions concerning the execution of the work the decision of the commissioners shall be final." Whether this provision of the contract is valid should be met at once, because of its commanding influence on the rights of the parties hereto.

This provision differs from the ordinary provision of like tenor found in nearly every building or construction contract only in the personnel of the arbitrators or umpires appointed to decide upon the contract, specifications, and work. If the word "architect" be substituted for the word "commissioners," we will have here a provision that is usual and customary in construction contracts. The effect of a provision of this kind is not doubtful. It is well settled in the law. It is not void because it ousts the court of jurisdiction, as earnestly contended by respondents. This court, in *Hudson v. McCartney,* 33 Wis. 331, gave full scope and effect to a provision of this nature in no uncertain terms, and the

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language of that case has since frequently met with approval. *Oakwood Retreat Asso. v. Rathborne,* 65 Wis. 177, 26 N. W. 742; *Bentley v. Davidson,* 74 Wis. 420, 43 N. W. 139; *Wendt v. Vogel,* 87 Wis. 462, 58 N. W. 764; *Chapman v. Rockford Ins. Co.* 89 Wis. 572, 62 N. W. 422. It is firmly established that, where matters are thus left to the decision of an architect, his decision is final unless impeached for fraud, accident, or mistake; and "the mistake here referred to is not a mere error in judgment as to the quality of the work or the responsibility for defects therein, upon conflicting evidence, which may be overthrown by a preponderance of evidence before the jury, but it means unintentional misapprehension or ignorance of some material fact, and it must be clearly established by the evidence, and so gross and palpable that it is equivalent in its effects to dishonest, fraudulent, or merely arbitrary action." *Wendt v. Vogel,* 87 Wis. 462, 466, 58 N. W. 764. This principle was recognized by the trial judge, but he seemed to be of the opinion that such powers could not be conferred upon one of the parties to the contract, and this notwithstanding the fact, fully recognized, that this court has repeatedly enforced contracts where they were agreed to be performed to the full satisfaction of one of the contracting parties. *Exhaust V. Co. v. C., M. & St. P. R. Co.* 66 Wis. 218, 28 N. W. 343; *Warder, Bushnell & Glessner Co. v. Whitish,* 77 Wis. 430, 46 N. W. 540; *Parr v. Northern E. M. Co.* 117 Wis. 278, 93 N. W. 1099; *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356.

Given the premise that one may lawfully contract to perform certain work according to plans and specifications to the satisfaction of a third party, and that contracts to be executed to the satisfaction of one of the contracting parties will be enforced, it is difficult to appreciate the logic which condemns a contract to be performed according to plans and specifications to the satisfaction of the other contracting party. Certainly no consideration of public policy calls for the condemnation of one that does not also condemn the

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other. The powers and duties of the one appointed as arbiter are not materially different in the one case than in the other. In neither case can the arbiter act arbitrarily or capriciously. There must be the exercise of honest judgment, and the person performing the contract is not to be denied the fruits thereof by a fraudulent, arbitrary, or capricious action on the part of the other.

Such considerations, however, do not constitute the underlying reason for upholding the contract. That reason is well stated in *Delaware & H. C. Co. v. Pennsylvania C. Co.* 50 N. Y. 258, as follows:

"When the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand and the parties made to abide by it, and the judgment of the tribunal of their choice."

Whether this is a wise or provident contract is entirely beside the question. That is something with which courts are not concerned. There is no doubt that parties may contract in such cases to submit such differences to an umpire or arbiter and agree that his decision shall be final. The validity of that agreement is not dependent upon the relation which the arbiter bears to the parties. They may agree to partial as well as impartial arbiters if they see fit to do so. Courts have no reason to interfere with the rights of parties to voluntarily contract in the one case that they do not have in the other. We therefore hold that this provision of the contract is valid and operates to confer upon the commissioners the same powers that are conferred upon architects by similar provisions in building contracts.

But this does not settle the case, as the trial judge seemed to think, as indicated by the suggestion in his opinion that if the provision be thus construed there was nothing left for the court to do but to render judgment on defendant's coun-

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terclaim. True, it does mean that some dignity attaches to the findings of the commissioners that the contract has not been performed in accordance with the specifications, which findings were accorded scant consideration by the trial court, to put it mildly. In fact, it means that their findings concerning the amount of material remaining unexcavated to complete the contract are final, binding, and conclusive unless impeached for fraud, error, or mistake so gross as to amount to constructive fraud on their part. This applies as well to other delinquencies on the part of the contractors, if there be any. Notwithstanding this, however, the question of the ultimate right of the plaintiffs to recover is for the determination of the court.

The plaintiffs urge numerous reasons for the avoidance of the rather disastrous effect of the findings of the commissioners upon their right to recover, which we will now consider.

As we proceed, it is necessary to bear in mind certain facts not yet appearing. As set forth in the statement of facts, it was found necessary to prosecute a considerable portion of the work by the use of a floating dredge. The proper and efficient way of using a floating dredge is to dig down stream. The water from above then fills the ditch and is held back by the lower end thereof against which the dredge is working. Thus sufficient water is maintained to keep the dredge afloat and up with its work. The water, too, carries the loose material and *débris* down stream ahead of the dredge and the ditch cleans itself. In digging up stream it is necessary to build dams below the dredge for the purpose of holding water to enable it to continue its progress up stream. In such case the slush and mud stirred up by the dipper of the dredge floats under the dredge and back down the ditch where it lodges somewhere along the course and fills up the ditch. The dams must be removed and, when that is done, slush, mud, and *débris* are let down the ditch below the dam and tend to fill up the lower stretches of the ditch.

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As already stated, at or about the time the contractors claimed to have completed the work the commissioners found 38,480 cubic yards in the bottom of the ditches which it was necessary to excavate in order to bring the ditches to the grade required by the plans and specifications. The contractors claimed that this resulted from material that had filled into the ditches after they had been dug; that the ditches had been dug to grade in the first instance; that it was the duty of the commissioners to keep them free and clear; and that the contractors were not obliged to re-excavate. This contention attracts attention to that provision of the contract which provides that "no ditch or lateral shall be finally accepted until completed for its entire length, and until such acceptance the contractor shall keep such ditch or lateral in good condition or repair at his own expense until it is finally accepted by the commissioners." The court construed this provision as requiring acceptance on the part of the commissioners of each ditch, main, or lateral as it was completed. Plaintiffs' attorneys contend for that construction here. The question is not very material in view of the fact, as the trial court found, that even though the commissioners were obliged to accept each ditch upon its individual completion, no request therefor was made by the contractors, because of which he held them responsible for the removal of 10,000 yards of earth in the West main which he found they had not removed. Nevertheless, the question of the proper construction of the contract is here, and we should dispose of it.

It will be observed that the language quoted is negative, and prohibits the commissioners from accepting any ditch until completed for its entire length. This language might justify an inference that upon such completion the ditch was to be so accepted, if such an intent could find support in other provisions of the contract or the conduct of the parties. We fail to discover any such intent revealed in the written contract, and the conduct of the parties in fact

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negatives such intent. That the commissioners did not so construe it is certain. That *Keachie* took the same view is evidenced by his testimony. At the trial the court asked him this question: "Why didn't you make a demand for payment of the balance due on each ditch when you completed it?" *Keachie* answered: "Because it was not in accordance with the contract." In order to give the construction contended for it is necessary to infer a positive provision that each ditch shall be accepted upon its completion from a negative provision that it shall not be finally accepted until completed for its entire length. The inference is by no means inevitable, and in view of the obvious contrary construction by both parties we do not hesitate to repudiate it.

But a brief review of the situation, we think, will demonstrate that the construction contended for by plaintiffs would not result to their material advantage. Even though the commissioners were obliged to accept a given ditch upon its completion, it must be conceded that they were under no obligation to do so until the ditch tendered for acceptance was completed throughout its entire length. It appears that in digging the East main ditch they started at the head and dug as far as the Northwestern Railway Company's tracks, in 1912; that the 870 feet lying between that company's right of way and Lake Monona were excavated in the latter part of the year 1913, and that the 100 feet across said right of way were not excavated until July, 1915. This ditch, therefore, was not completed throughout its entire length until about the time the contractors claimed to have completed the contract, it being about the last work they did. Clearly, there was no time when the contractors could have demanded acceptance of this ditch, thereby relieving them from the duty of keeping the same clear. As to the West main ditch, the court found that it never was dug deep enough and that there were 10,000 yards of unexcavated material in the bottom thereof, the cost of the removal of which he deducted from the contract price. It would seem

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clear that they were never in a position to demand the acceptance of this ditch. As to lateral W-8, it appears that the contractors deepened the same for a distance of 1,000 feet just before their so-called completion of the contract. Measurements were taken in lateral E-2 immediately after its completion in June, 1915, and it was found that 449 cubic yards therein remained unexcavated, and similar observations are justified with reference to other ditches. Furthermore, not a single ditch was completed to a one-to-one slope, as required by the contract. The reason for not doing so is stated by *Keachie* as follows:

"I stated to the commissioners that a one-to-one slope could not be dug with a floating dredge, and after the ditch was constructed I stated that the slope of the ditch would approach an angle of forty-five degrees, that is one to one, due to the effect of erosion and frost, and that dirt does not support itself. I explained to the commissioners that by digging the ditches wider at the bottom the banks in sloughing in would approximate a one-to-one slope. I made that explanation twice. The second time was when Sacket and I went to Mr. Riley after receipt of the commissioners' letter of December 19, 1911. Early in 1913, when we purchased the small dredge, I stated that we would dig the laterals with that machine, making them wider at the bottom and with more perpendicular slope; that we would do the best we could to get a one-to-one slope. I made that explanation to show why they were not getting a one-to-one slope. They had it in their specifications and they were ignorant."

The record discloses nothing more nearly approaching a modification of the contract than the testimony quoted. There is no evidence whatever that the commissioners waived the one-to-one slope, or that there was any agreement as to the increased width or the increased depth that should be given these ditches in lieu of the one-to-one slope. *Keachie* represented that by digging the ditches in this manner they would eventually take the one-to-one slope, and the district would get the ditches called for by the specifications. This was an important matter, because it appeared that a

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one-to-one is an ideal slope for a drainage ditch. We cannot hold that the one-to-one slope was waived, nor that the deeper and wider ditch satisfied the requirements of the contract. The commissioners went no further than to permit the contractors to have their own way as to the method employed in producing a ditch that should satisfy the requirements of the contract. Ditches not dug to a one-to-one slope, therefore, did not respond to the requirements of the contract, and the commissioners were under no obligation to accept them, even though the contract be construed as requiring such acceptance upon completion of each particular ditch.

The contractors further contend that the commissioners waived their right to object that the work was not done according to plans and specifications, by reason of the fact that payments were made from time to time as the work progressed under the provisions of the specifications that "intermediate payments based upon approximate estimates for work performed during the preceding month will be made during the first week of each succeeding month during the progress of the work, and will be payable on or about the 15th day of each succeeding month. Such payments shall be eighty per cent. of the contract price for the work that shall be completed to the satisfaction of the commissioners or such other portion or percentage thereof as may be agreed upon between the parties hereto, and the remainder of the contract price shall be paid within ten days after the completion of the contract to the satisfaction of the commissioners." It is settled in this state that

"Where a building contract provides that the building shall be constructed according to certain plans and specifications to the satisfaction of the supervising architect, who shall inspect all material and work as the building is constructed, with power to reject any material or work not deemed by him to be in compliance with the contract, and to require unsatisfactory constructions to be removed and the work done over in a satisfactory manner, the manifest intent

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is that unsatisfactory material or construction shall be promptly rejected, and that the architect shall not, by silence, allow unsatisfactory construction to proceed to a point where its removal from the building will be attended with serious loss to the builder, and then reject it; that a failure to reject material or work seasonably, and in the manner contemplated by the contract, operates as a waiver of defects in regard thereto and an irrevocable acceptance of such material or work as satisfactory under the contract, in the absence of some clear, unmistakable provision in such contract to the contrary." *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 127, 128, 81 N. W. 136.

This rule applies where the work of construction proceeds under the supervision of the architect who is required to inspect all material and work as the building is constructed and has power to reject any material or work not deemed by him to be in compliance with the contract. The rule simply gives effect to the intention of the parties as expressed by their contract. In other words, it derives its force from the contract, and applies only where the work and material are to be inspected as the construction proceeds. While the construction work here was not that of a building, no reason is perceived why the same rule might not apply if such appeared to be the intention of the parties. Manifestly, inspection as the work proceeds should be a prerequisite to the application of the rule. The contractor should be charged with some responsibility. Where he contracts to do a certain thing in a certain manner and in accordance with certain specifications it is his duty to make his work comply with the contract and specifications unless he is relieved from that duty by the terms of the contract itself. The contract here does not provide for inspection. The intermediate payments were to be based upon approximate estimates. On the assumption that the ditch was dug to the required prism, these estimates were very simple, in the computation of which the only factor to be ascertained was the distance dug or traversed during the month. As a matter of practice, the estimates were approx-

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imated in this way. No attempt was made to take accurate measurements of the work in order to arrive at these estimates, and this was thoroughly understood by the contractors. Furthermore, owing to the manner in which the ditches were dug, actual measurements were impracticable, for the reason that a considerable portion, if not all, of the ditch dug during the month was filled, partially at least, with water, mud, and slush kicked back by the operation of the dredge, and the bottom of the ditch had not assumed stability or permanent form. Under the circumstances, we hold that the rule of the *Shores Case, supra,* does not apply, and this is not affected by the fact that commissioners, from time to time, called the contractors' attention to manifest irregularities in the work, such as that two of the laterals headed up stream where they opened into one of the main ditches, that certain other places required straightening, and that other portions of the work were, obviously, not to grade. These were discrepancies manifest upon casual observation and did not call for technical inspection or actual measurement.

The contractors further claimed a waiver on the part of the commissioners by reason of the following circumstances: In an annual report filed by the commissioners with the circuit court on July 1, 1914, occurs this paragraph:

"Said commissioners do further report that the work of excavating and construction of ditches according to plans approved by the court is progressing in a satisfactory manner, with the exception that the contractor seems to be unable to do the work as rapidly as the property owners and commissioners wish it done."

It further appears that on April 11, 1914, George Riley, one of the commissioners, wrote to the plaintiffs that he was instructed by the commissioners to request that a renewal bond be furnished. The surety company, as a condition

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precedent to the issuance of a new bond, caused the following stipulation to be drawn and signed:

"Stipulated by *George R. Keachie* and *Howard L. Dessert* of Madison, Wisconsin, principals, the Title Guaranty & Surety Company of Scranton, Pennsylvania, surety, and the commissioners of Starkweather drainage district, Dane county, Wisconsin, obligee, on that certain bond or undertaking, dated on or about the 19th day of March, 1913, in the sum of nine thousand ($9,000) dollars, conditioned for the performance of a contract, dated the 3d day of February, 1913, between said principal and said obligee, for the construction of ditches, drains, and laterals at the Starkweather drainage district:

"First. That said contract has been satisfactorily performed to date hereof in accordance with its terms and to the satisfaction of said obligee, except in so far as the time for completion is concerned;

"Second. That the time for the completion of said contract be, and hereby is, extended to and including the 1st day of January, 1915;

"Third. That the time within which any action may be brought against the surety on said bond is hereby extended to June 1, 1915.

"Signed and sealed this 27th day of May, 1914.

"KEACHIE & DESSERT,
"By George R. Keachie.
"THE TITLE GUARANTY & SURETY CO.,
"By (signed but name not readable)
"Attest: J. H. Law, Secretary.
"STARKWEATHER DRAINAGE DISTRICT,
"By George C. Riley, Treas."

In view of the undisputed facts, it is difficult to understand the reason, motive, or purpose of the commissioners in making the (quoted) observation in their report to the court. The same is true of the stipulation above set forth. As to the stipulation, the evidence is clear that the commissioners did not authorize it to be signed by Mr. Riley, who purported to sign it on behalf of the commissioners. In fact, it satisfactorily appears that the whole matter was

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handled by Mr. Riley himself without the knowledge of the other commissioners, and that it in fact does not constitute the act of the commissioners. But however that may be, we see no reason for holding that what was said in the report of the commissioners to the court, or in the stipulation either, constitutes conduct on the part of the commissioners which reacted either in the nature of waiver or estoppel. So far as the report is concerned, there is no evidence that the contractors ever read it, or knew of this assertion which it contained, nor that they relied upon it, nor that their future conduct was in any manner influenced by it. While they knew of the stipulation, presumably, there is no suggestion that their future conduct was in any manner controlled or affected thereby, or that they were led to act to their damage in reliance thereon. In fact, it affirmatively appears that numerous corrections were made in the ditches after the date of the report as well as the stipulation, which conduct negatives the idea that the contractors construed either document as an expression by the commissioners of their satisfaction with the work already completed or as indicating their acceptance thereof.

In the statement of facts we have set forth the only new provision of the second contract which provides for the payment of damages for failure to complete the contract within the specified time. The trial court construed this provision as one calling for a penalty instead of liquidated damages. In this we think the court was in error. The amount allowable thereunder, and which defendants claimed, is $2,163.04. A more difficult situation for the computation of actual damages could hardly be imagined. It was pre-eminently a case justifying a provision for stipulated damages. The parties so designated it in the contract, and while such designations are not given effect by courts, if they appear to have been used ill-advisedly and not to express the real intention of the parties *(Grant M. Co. v. Marshall & Ilsley Bank,* 166 Wis. 547, 165 N. W. 14) we see no indication that the parties

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here did not intend it to be what they called it. The provision should be construed as one calling for liquidated damages.

We think the court erred in refusing to credit the defendants with $100 advanced to the Chicago, Milwaukee & St. Paul Railway Company, as security for the expense of opening the railway bridge over lateral E-2 and in allowing $61.62 to the plaintiffs for the cost of the removal and replacement of the bridge at the point where lateral E-2 crosses the right of way of the railway company. It will be unnecessary to prolong this opinion by a recital of the evidence bearing upon these items.

We are impressed that there is another very troublesome barrier to plaintiffs' recovery. The plaintiffs are seeking to recover on the contract. It is an entire contract, and in order to recover they must show substantial performance. The court found that the cost of completing the contract was $1,875, even ignoring the findings of the commissioners. We do not decide whether, under the circumstances, a finding that the contract had been substantially performed could be sustained. We do no more than suggest that it would require rather generous consideration to do so. This feature should have the serious attention of the trial court on a new trial.

We appreciate that there is little left of the case, yet we do not feel that we can or should render judgment. We think the plaintiffs should be accorded the opportunity of impeaching the findings of the commissioners, if they can. No attempt to this end was made, and in fact was not necessary, in the view the court took of the case. Justice requires that they be not deprived of the opportunity now. Another reason why we cannot render judgment is that we have no way of estimating the expense of completing the contract, unless we be governed by the unit cost of excavation applied by the trial judge to the 10,000 yards which he found to remain unexcavated. There is no evidence that this applies to other portions that must be excavated. However, it will not be

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necessary to retry the case *ab initio*. The testimony taken on the former trial may be considered as in the case upon a new trial, and only such additional testimony as may be necessary to meet the views of the court as expressed in this opinion need be taken.

By the Court.—Judgment reversed, and cause remanded for further proceedings in accordance with law and with this opinion.

ESCHWEILER, J. *(dissenting)*. I concur with the construction given by the majority opinion to the provision in the contract as to liquidated damages and as to the small items mentioned.

I think, however, that the doctrine invoked by defendant as to the controlling and final effect to be given to the commissioners' determination upon all questions concerning the execution of the work and interpretation of the specifications while, as held by the majority opinion, applicable here upon questions which they answered in their own favor, is equally applicable and binding upon questions arising during the work and answered in effect by the commissioners in plaintiffs' favor. In other words, that in fairness such a sword placed in their hands by the contract should be two-edged and cut both ways. It was expressly so held in *Chicago, St. F. & C. R. Co. v. Price*, 138 U. S. 185, 194, 11 Sup. Ct. 290.

The contracts and specifications made parts thereof required plaintiffs to do this work "under the control, direction, and supervision of the commissioners and their engineer."

The term "engineer" was defined as such person "as shall be employed by the commissioners to superintend, under the direction of said commissioners, the construction of said proposed work." Such an engineer was appointed and acted.

The commissioners were defined as the persons appointed and "who are possessed of the powers and charged with the duties provided in chapter 419, Laws 1905," etc.

Under this same chapter and by sec. 1379—15, Stats., the

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commissioners are required to give a bond conditioned for the faithful discharge of their duties and faithful accounting for and application of all moneys. By sub. 6 of the same section it was provided that on the first Tuesday of July of each year they shall file with the clerk of the court an itemized statement of receipts and disbursements "and an additional statement of the length of the ditch or ditches dug, with their *width, depth,* prices per cubic yard, and all such other items as shall be necessary to give an intelligible understanding of the expenditures of all moneys disbursed, and leave said report in said office for examination by parties interested at all times."

This statutory provision as to the statements of the width and depth of the ditches dug was deliberately ignored and disregarded by the commissioners, and in none of the statements filed by them during this period was such requirement complied with, and in two of such annual statements they expressly say they have "made no detailed inspection of the ditches and laterals for the reason that none of the work has been accepted, and under the contract the contractor is compelled to keep the ditches and laterals in repair until the work is accepted."

The conclusion seems to me clear that these commissioners and their engineer were charged with the constant and continuous duty of inspection and supervision of the work as it progressed. The very fact that the statute required them to report to the court, for the benefit of those whose money was being expended, the width and depth of the ditches dug is an express mandate of the law under which they are acting, requiring that they inform themselves constantly as the work progressed, not only of the length of the ditches that were being dug, but of the equally important features as to the width and depth. It is evident from the testimony this could have been ascertained from time to time by the commissioners and the engineer as the work was progressing nearly if not quite as well as it was done in 1915 when the work was practically over. They could not interpret the

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contract to the effect nor lawfully insert any provision in the contract having an effect that would nullify the plain statutory duty imposed upon them.

Payments were constantly being made by these commissioners to the plaintiffs for the work being done. Such payments were made under and pursuant to the provision in the specifications which has been cited in the majority opinion, but for convenience is here repeated and reads as follows:

"(3) Intermediate payments based upon approximate estimates, for work performed during the preceding month, will be made during the first week of each succeeding month during the progress of the work, and will be payable on or about the 15th day of such succeeding month. Such payments shall be eighty per cent. of the contract price for the work that shall be completed to the satisfaction of the commissioners or such other portion or percentage thereof as may be agreed upon between the parties hereto, and the remainder of the contract price shall be paid within ten days after the completion of the contract to the satisfaction of the commissioners."

There is no provision in the contract here involved, or in the specifications, which in any wise qualifies the language above quoted with reference to these intermediate payments. The situation, therefore, is totally different from that in many cases upon building contracts where provisions are ordinarily inserted to the effect that such intermediate payments shall not be construed as an acceptance of the work, a particular instance of which may be found in *Siebert v. Roth,* 118 Wis. 250, bottom of p. 251, 95 N. W. 118. Some such equivalent restriction as appears in that case can be found in the standard form of agreement between contractor and owner issued by the American Institute of Architects and under which a large number of building contracts are performed.

The provision above quoted authorized payments to be made by the commissioners for work that shall be completed to the satisfaction of the commissioners and the payments to be eighty per cent. of the contract price for such work.

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This provision evidently charges the duty upon the commissioners to pay for work which is completed to the one hundred per cent. satisfaction and then a withholding of the twenty per cent. of the contract price until the final completion of the contract, and not a payment for work which has been completed only up to the eighty per cent. of the requirements of the contract. They are plainly required to see to it that no payments shall be made for any length of ditch claimed to have been excavated unless such length of ditch has been done to their satisfaction, and this should be held to mean completed not only in length but in depth and width.

I can see no grounds upon which it can be inferred that the *satisfaction* of the commissioners as to the completion of the work upon which they make partial payments is any different from the *satisfaction* of the commissioners when the remainder of the contract price is to be paid. It must be final and not subject to subsequent change or revocation. The nature of the work was such that it is self-evident that it would be a very expensive process for the contractor to return to a ditch or lateral upon which work had once been done and do further work therein. The commissioners had absolute control of the situation by their power to direct and supervise, and when the work was not progressing to their satisfaction as to the requirements of length or width or depth they might refuse such partial payments until the work was so done, and their determination in that regard would be final and decisive on the plaintiffs. Having by their payments in effect recognized that the work in the ditches for whose length the payments were being made were completed to their satisfaction, they ought to be bound thereby. How else could they comply with the statutory conditions for a faithful discharge of their duty and faithful accounting for an application of all the moneys received by them unless and except they saw to it that the work under their direction and supervision was being done to their satisfaction at the time they thus disbursed the money?

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I think, therefore, that these payments were not in the nature of so-called progress certificates, but were absolute and binding as a determination of matters which were then possible of ascertainment (see *Hebert v. Dewey,* 191 Mass. 403, 411, 77 N. E. 822); and that the work being done here under the control and direction of the engineer and commissioners is within the rule recognized as to building contracts in such cases as *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 131, 81 N. W. 136; *Laycock v. Moon,* 97 Wis. 59, 72 N. W. 372.

I think also that their acts in entering into the second contract, which would have been a perilous thing to do if at that time the contractors were committing such serious breaches of the first contract as it is now claimed they did; their statements filed with the clerk certifying in effect to the fact that the work was progressing satisfactorily except as to the question of speed; their obtaining the new bond from the surety company upon the stipulation signed by one of them, also expressing satisfaction with the work, all are of weighty consideration in determining that the commissioners should be estopped from now going behind the indicated satisfaction with the work from time to time, as shown by their partial payments. I do not think they should be permitted to take the stand that they, as trustees, have overpaid these contractors for work which was being done before their eyes and under their supervision on the claim that they are now not satisfied with the same.

VINJE, J. I concur in the foregoing dissenting opinion of Mr. Justice ESCHWEILER.

ROSENBERRY, J., took no part.

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GUGEL, Respondent, vs. OLIN and others, Appellants, and another, Respondent.

November 9, 1918—January 7, 1919.

Master and servant: Implied promise to pay for services: Attorneys at law: Liability to pay client's brother, a lawyer, for assisting in suit.

1. A promise to pay for services rendered by request will usually be implied from the very fact of the request; but the relations or the circumstances of the parties may be such that no such implication will arise.
2. A finding by the jury in this case that the plaintiff, a lawyer, was employed by the defendants, a firm of lawyers, to assist them in a lawsuit in which they were attorneys for plaintiff's brother, with the understanding that defendants were to be personally liable for his services, is *held* not to be supported by the evidence. ESCHWEILER and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Dane county: G. N. RISJORD, Judge. *Reversed.*

Action by the plaintiff, a Milwaukee lawyer, to recover of the defendants *Olin et al.*, composing the law firm of Olin, Butler, Stebbins & Stroud, practicing at Madison, $400 for legal services rendered at their request and on their implied promise to pay what such services were reasonably worth.

The plaintiff's work was performed in 1915 in the case of Pfister v. Gugel, then pending in the circuit court for Dane county, in which the defendant (the brother of the plaintiff in the present action) had employed the *Olin* firm to represent him.

The defendants in the present action admit that the plaintiff rendered some legal services in the action referred to, but deny that they employed the plaintiff or that they agreed or expected to pay for such services, but that such services were in fact rendered by the plaintiff to his brother because of the relationship between them. On motion of the defendants the respondent *E. G. Gugel* (who was the defendant in the case of Pfister v. Gugel) was brought in as a party, and the

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defendants by cross-complaint asked that in case it was determined that they were liable to the plaintiff that they have judgment against *E. G. Gugel* for the amount that they were compelled to pay to the plaintiff.

There is no dispute as to the fact that the plaintiff rendered services in the case and participated in the trial, assisting the defendants, but the circumstances leading up to that participation are in some dispute. It seems that the plaintiff and *Mr. Stebbins,* of the defendants' firm, were acquainted, having been in the same class in the Wisconsin University law school, and it is the claim of plaintiff that *Mr. Stebbins,* on learning of the relationship of the plaintiff to his client and also that the plaintiff was in Madison on other business, told his client, *E. G. Gugel,* to bring him to the office as he *(Stebbins)* wanted to see him; that the plaintiff at first objected, but finally went, and when he came to the office *Mr. Stebbins* at once said to him, "*Frank,* I want you to help me and sit in this case with me;" that he (plaintiff) at first objected, and on *Stebbins* repeating his statement said that he thought *Stebbins* was looking for a goat, some one to put the blame onto in case the suit was lost, but finally said, "All right, upon the distinct understanding that I don't come into the case on behalf of my brother," to which *Mr. Stebbins* assented.

Mr. Stebbins's version of this transaction was that his client informed him that his brother *Frank* was in Madison, and he then recognized him as a classmate in law school; that he *(Stebbins)* asked if he *(Gugel)* had talked with *Frank* about the case, and on his stating that he had done so said that if he cared to bring *Frank* to the office he *(Stebbins)* would be glad to talk with him about the case; that *Frank* afterward came to the office with his brother and he *(Stebbins)* said to *Frank* that he doubtless had a great interest in the case in which his brother was defendant, to which *Frank* agreed, and he *(Stebbins)* then said that if he *(Frank)* cared to participate in the case he would be glad to have his assistance. It is not claimed by either party that

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anything was said about compensation. The plaintiff returned to Milwaukee and considerable correspondence followed between the parties about the case. In a letter to *Mr. Stebbins* written October 28, 1915 (two days after the interview aforesaid), the plaintiff, after discussing the case somewhat, writes as follows:

"Now, *Mr. Stebbins,* I want it strictly understood that if I sit in the case with you, participate in its trial, that it is strictly at your request; not at the request of my brother or pursuant to my desire. I want you to feel that I feel and my brother also feels that you gentlemen are fully capable of handling this case, and my coming up there to see you in company with my brother the other day did not have for its purpose any interference in the case on my part. However, understand me rightly, that if you desire that I should participate in the disposition of this matter, under the circumstances, I will be pleased to afford you whatever assistance I am capable of; but always upon the understanding that you control the case and that I serve merely in an advisory capacity. I do not want to be the cause of any lack of interest in the matter."

To this *Mr. Stebbins* responded in a letter written on the following day as follows:

"I understand fully your attitude in this matter and appreciate your willingness to co-operate in the case and your desire not to have it appear that you are getting into the case at your request. On my part, I should like you to understand that I want your assistance and co-operation, both in the preparation of this case and on the trial thereof. It is a case where there are some of the facts that are quite strongly against us and we will have to do some good work if we get your brother out of it successfully. As soon as I knew of the relationship I felt sure that you would have a deep interest in the case, and it was for this reason that I asked your brother to bring you over to the office."

Other correspondence followed concerning the case but containing nothing bearing materially on the present question. The case came on for trial March 6, 1916, at Madison, and plaintiff was present assisting. It was an action arising

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out of a contract for the sale of a farm by *E. G. Gugel* to one Pfister for an agreed price of about $30,000, on which $1,800 or $2,000 had been paid down. Pfister claimed fraud in the sale and sued to recover back the down payment and damages. After a half day in the trial court the case was settled by the parties and the litigation closed. On March 13th plaintiff wrote to his brother saying, "When you pay *Stebbins* have him give you a statement showing what he charges you for services and what the expenses are; then let me know." On March 14th the defendants' firm sent an itemized bill to *E. G. Gugel* for services and expenses in the case, amounting to $549.48, which contained no charges for the services or expenses of the plaintiff. This account was paid March 20th. On the same day the plaintiff wrote to his brother, *E. G. Gugel,* as follows:

"I have been thinking since you left last Saturday and I want to ask you once more whether you at any time suggested to *Mr. Stebbins* that you would like to have me help *Stebbins* in the case. You see this will become very material if I should have to proceed against *Stebbins* and the rest for my compensation for my services in the action. If you did, say so, and if you did not, say so also."

On the 25th of March plaintiff again wrote his brother as follows:

"Received your letter this morning and was pleased to hear from you. I sent in my statement yesterday and expect to hear from them by Monday. In the meantime do not say anything about it. Before you or any of you do any talking, let me get through with them first. You see, I may have to sue them and may need you as a witness, and in that case, consequently, the less said in the meantime the less they will be able to bring up at the time of the trial. They may and may not allow the thing to go in court. I shall, however, insist upon having every cent that is coming to me.

"I took off a few minutes yesterday and looked up the law relating to my claim against the *Olin* firm. I am absolutely within the law. That being so, there is no reason why I should not begin my legal rights to the last cent. I will let you know just as the negotiations proceed."

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The plaintiff admits that *E. G. Gugel* sent him a copy of the *Stebbins* bill a short time after it was sent to him *(E. G.)* and before he sent his bill to *Mr. Stebbins.* March 22, 1916, the plaintiff mailed an itemized bill for services to *Mr. Stebbins's* firm amounting to $410. On the 25th of March *Mr. Stebbins* replied, acknowledging receipt of the statement and stating that they had forwarded the statement to his brother, *E. G. Gugel,* against whom the charges should have been made. *E. G. Gugel,* on April 4th, replied to *Mr. Stebbins,* returning *Frank's* bill and stating that he *(Stebbins)* hired *Frank* and must settle with him.

There was a jury trial and a special verdict rendered, by which it was found (1) that the plaintiff was employed by the firm of Olin, Butler, Stebbins & Stroud with the understanding that the firm was to be personally liable for the services, and (2) that the reasonable value of the services was $100. Judgment was rendered against the appellants on this verdict and dismissing their cross-complaint, and from that judgment this appeal is taken.

For the appellants there was a brief by *Jones & Schubring* of Madison, of counsel, and a reply brief by *H. L. Butler* of Madison, one of the defendants, and oral argument by *E. J. B. Schubring.*

For the respondents there was a brief signed by *F. H. Gugel, in pro. per.,* and *Gugel & Kline,* attorneys for *E. G. Gugel,* and oral argument by *F. H. Gugel.*

WINSLOW, C. J. The jury having found that the appellants' firm employed the plaintiff to assist them upon the understanding (mutual of course) that they were personally to pay him, the vital question in the case is simply whether there is any evidence upon which that finding can stand.

It is certainly a remarkable transaction which the plaintiff claims and which the jury have found. Lawyers are not wont to employ counsel and agree to pay them out of their own pockets, at least lawyers of long experience and exten-

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sive practice, but that does not make the plaintiff's theory incredible.

Giving the most favorable construction to the evidence which it will reasonably bear, we find a request on the part of the appellants that the plaintiff assist them in the case, and a consent thereto by the plaintiff followed by the rendering of the assistance; but we find no express promise to pay for such assistance. Of course an express promise to pay for services rendered by request is not ordinarily necessary; a promise to pay will usually be implied from the very fact of the request; but the relations of the parties may be such or the circumstances surrounding them of such a character that no such implication will arise. Thus no contract to pay is implied when a parent or one standing in that relation requests services of a child living at home, though the child be an adult *(Taylor v. Thieman,* 132 Wis. 38, 111 N. W. 229), and the same rule applies where services are rendered between persons who are *de facto* members of the same family, though there be no blood relationship. The relationship of the parties is such that it is naturally presumed that the services are rendered gratuitously, without thought of compensation on either side, and hence there is no implication of a promise to compensate, but the party claiming compensation must show an express promise therefor. Many valuable services are simply the incidents of feelings of friendship or neighborly accommodation and are universally expected to be gratuitous. In this class fall board and lodging furnished to an invited guest *(Harrison v. McMillan,* 109 Tenn. 77, 69 S. W. 973), political services rendered to a friend in a campaign *(Levy v. Gillis,* 1 Penn. (Del.) 119, 39 Atl. 785), the indorsement of a friend's note *(Hagar v. Whitmore,* 82 Me. 248, 19 Atl. 444), mutual services between friends rendered without intent to charge *(Gross v. Cadwell,* 4 Wash. 670, 30 Pac. 1052), and many others that might be named. See, on this subject, 2 Page, Contracts, § 777.

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We think the present case falls within this latter class. This was the situation: The plaintiff's brother, with whom he was on the best of terms, was engaged in serious litigation. Naturally the plaintiff must have felt a deep interest in the result; he would be less than human were it otherwise. His brother had employed an entirely competent firm to attend to his interests. This firm was not looking out for professional aid, but on learning that the client had a lawyer brother who was in the city and was also a classmate of *Mr. Stebbins,* that gentleman expressed a desire or a willingness to see and talk over the case with him. As a result of this the plaintiff came to *Mr. Stebbins's* office and it was then arranged that plaintiff was to participate in the case, but no word was said about compensation. It stretches credulity to the breaking point to suppose that *Mr. Stebbins* then had any idea of retaining the plaintiff at the expense of his firm. Young lawyers sometimes get help from older lawyers in their cases and pay for it themselves, if, as is rarely the case, the older lawyer makes any charge; but old established law firms handling large interests all the time do not do things that way. If, by reason of the magnitude or delicacy of the questions involved, they feel the advisability of counsel, they tell their clients so, and, with their clients' consent, employ the best of counsel, at the expense of the clients. The court is not only entitled to but must take notice of this fact in judging what the acts of the parties here meant: it is part of the atmosphere of the transaction. To our minds the inevitable and only reasonable conclusion from the circumstances here is that *Mr. Stebbins* supposed that the plaintiff was desirous of assisting his brother, and for that reason only, and with no thought of hiring him, suggested that he would be pleased to have the plaintiff participate in the case. The whole atmosphere and surroundings repelled the idea that employment was intended. The letters which immediately followed tend to confirm this conclusion. The

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plaintiff says that he wrote the letter of October 28th because he "wanted to clear the matter up so there could be no misunderstanding between myself and *Mr. Stebbins* about my coming into the case and my position in the case." Strange indeed, if this was the purpose of the letter, that no word was said in it concerning the only thing about which there well could be any misunderstanding, namely, the question as to the plaintiff's compensation, if he expected any. But, granting that the plaintiff honestly supposed that the appellants' firm had consciously hired him at their own expense because they felt that they needed his help, the reply of *Mr. Stebbins* to this letter was certainly enough to put him upon inquiry on this point, if not to convince him that *Mr. Stebbins* did not so understand the situation. In this letter *Mr. Stebbins* says that "as soon as I knew of the relationship I felt sure you would have a deep interest in the case, and *it was for this reason* that I asked your brother to bring you over to the office."

The meaning of this is unmistakable; it was the deep interest which *Mr. Stebbins* supposed plaintiff would have in his brother's troubles which led him to suggest to plaintiff that he participate in the case. It seems that any person who was really trying to clear up misunderstandings and leave no doubt as to his position in the case would infallibly have discovered from this letter that there was a vital misunderstanding on the question of compensation, and would have at once brought the question up definitely and pointedly, either by personal interview or by letter, and had it settled before proceeding further. Not so, however, with the plaintiff; he closed the correspondence on the subject right there, knowing that *Mr. Stebbins's* thought in the matter was that the plaintiff's interest in his brother's welfare would be a sufficient inducement for him to assist in the lawsuit, and proceeded to pile up a bill of $400 for legal services against brother lawyers.

That the plaintiff at some time during the progress of

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events learned that *Mr. Stebbins* did not consider that he had personally employed him is made quite clear by the letters to his brother in March. He then begins to prepare for the present lawsuit. March 13th he writes his brother asking him to send a statement of *Stebbins's* bill when he pays it; March 20th he writes asking his brother what he said to *Stebbins*, as it "will become very material if I should have to proceed against *Stebbins* and the rest for my compensation;" and five days later he writes that he has sent his bill to the *Stebbins* firm and cautioning his brother not to say anything, as he may have to bring a suit for his pay. All this preparation for a lawsuit took place before the plaintiff had even presented his bill, and before a word had been said between plaintiff and the appellants about compensation.

It is not a pleasant picture thus drawn. We of the bench and bar talk much of the nobility of the profession. We say, and we say truly, that the practice of law should be a ministry at the altar of justice rather than a money-making business, but such transactions as these make this thought unintelligible to the layman, and tend to justify the too frequent jeers at the law and its administration.

Mr. Tulliver regarded all lawyers as "raskills" and thought that the only sure way to win a lawsuit was to hire the biggest "raskill" as his own lawyer. This was on the theory that the practice of the law is simply a battle of shrewd wits, which is to be won by the sharpest trickster. There should be nothing in the conduct of any lawyer to lend color to that belief. His standard of conduct can hardly be too high. Chief Justice RYAN well said *(Wight v. Rindskopf*, 43 Wis. 344, 356), "The profession of the law is not one of indirection, circumvention, or intrigue." The lawyer who really believed his profession to be service at the shrine of justice would have gone to his brother lawyer at the very first moment when he learned that they did not understand things alike and talked the matter over, and if he found that his brother was honest in his thought that no contract in-

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volving personal liability had been made (as is evident in the present case) would have at once abandoned any such claim as is here made.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the complaint on the merits.

ESCHWEILER, J. *(dissenting).* The general rule is firmly established that where services of a kind for which compensation is usually paid are rendered by one to another upon request, and the results thereof accepted by the latter, nothing being said as to compensation, the law steps in and creates an obligation to pay for the reasonable value thereof. *Miller v. Tracy,* 86 Wis. 330, 56 N. W. 866; *Williams v. Williams,* 114 Wis. 79, 84, 89 N. W. 835; *Felker v. Haight,* 33 Wis. 259; *Kelly v. Houghton,* 59 Wis. 400, 18 N. W. 326; *Link v. C. & N. W. R. Co.* 80 Wis. 304, 50 N. W. 335; *Wheeler v. Hall,* 41 Wis. 447; *Pangborn v. Phelps,* 63 N. J. Law, 346, 43 Atl. 977; 2 Page, Contracts, p. 1169, § 772.

I cannot acquiesce in the doctrine which is in effect announced by the majority opinion that this general rule is to be qualified so that a different presumption arises and a different rule applies when the dispute is between attorneys than when between other individuals of the great mass of mankind.

That no such distinction has heretofore been recognized seems well established. Weeks, Attorneys (2d ed.) p. 673, § 335, says:

"So where one attorney does business for another, the attorney employed generally looks to the attorney who employs him and not to the client. If the attorney employing another wishes to escape personal responsibility he must give express notice that the business is to be done on the credit of the client; and it is no defense that the business was known by the plaintiff to be done for the benefit of the client."

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See, also, 2 Thornton, Attorneys, p. 952, § 559; *Scott v. Hoxsie,* 13 Vt. 50; *Graydon v. Stokes,* 24 S. C. 483; *Serace v. Whittington,* 2 Barn. & C. 11; 6 Corp. Jur. 734.

Defendants relied by pleadings and argument here by way of defense as follows: (1) That if any contract was made it was by the two letters of October 28th and October 29th, and that these two letters, in connection with the testimony as to the surrounding circumstances, require the conclusion as a matter of law that there was no contractual relationship between the parties; (2) that the minds of the parties never met; and (3) that if there was a liability on their part it should be shoved over to the brother, *Ernest G. Gugel.*

As to the first and third grounds, if the test of the general rule above stated is applied it appears as though both the questions so raised were within the wide province of the jury's determination. On the first point, we have the expression in *Mr. Stebbins's* letter to the plaintiff, "On my part I should like you to understand that I want your assistance and co-operation, both in the preparation of this case and on the trial thereof," which, if standing alone, would have been sufficient to create beyond question a basis for liability. That it was modified by other expressions in the same letter and by surrounding circumstances could not properly take it from the jury. On the second point, in view of plaintiff's letter to *Mr. Stebbins* saying, "Now, *Mr. Stebbins,* I want it strictly understood that if I sit in the case with you, participate in its trial, that it is strictly at your request; not at the request of my brother or pursuant to my desire," it became also a question for the jury to solve.

The drawing of reasonable inferences from the facts in evidence is jury duty. *Gessner v. Roeming,* 135 Wis. 535, 536, 116 N. W. 171; *Vilas v. Bundy,* 106 Wis. 168, 176, 81 N. W. 812.

The undisputed and indisputable facts that the defendants were of the highest standing, competent and able to carry on

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the lawsuit then pending without outside assistance, though persuasive as an argument against plaintiff's case, do not necessarily determine it. The jury might well have considered, what is matter of general knowledge, namely, that the able and competent professional gentlemen are invariably the busy ones and might require assistance in some particular case, from lack only of time in which to look after all of its details. This consideration might have had weight with the jury in view of what was said by *Mr. Stebbins* in his letter to plaintiff of November 11th, "I have had, as yet, little opportunity to do much work on the law of this case and am therefore particularly glad that you are going into it so thoroughly. I suggest, in order to save duplication, that you send me such brief or notes as you may prepare as soon as possible."

In cases for recovery for the reasonable value of requested, accepted services, that the recipient did not expect to pay for them is immaterial. 2 Thornton, Attorneys, pp. 952–954, § 559. This question was squarely raised and settled in the case of *Miller v. Tracy,* 86 Wis. 330, 56 N. W. 866, where the plaintiffs' firm of attorneys rendered services for the defendant, who was administrator of an estate and whose own counsel could not act with reference to the particular claim then in litigation. The defendant objected to paying on the ground that there was no express contract for services and no meeting of the minds of the parties in respect to their employment. This court there said (p. 336):

"But we think that the liability of the defendant in this case may be safely rested upon the ground that if services are rendered, as in this case, in the mistaken belief that there is a contract therefor, when the minds of the parties have never met, a recovery may be had *quantum meruit* for the benefit conferred by them, and upon the ground 'that he who gains the labor and acquires the property of another must make reasonable compensation for the same' (citing *Van Deusen v. Blum,* 18 Pick. (35 Mass.) 229); and that this rule is particularly applicable to the case of an administra-

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tor who has assets out of which to indemnify himself. . . . The fact that he [defendant] has deliberately taken the benefit of the services and disbursements in question which enabled him to perform his duty as administrator, dispenses with any necessity of proving a previous request, and we are of the opinion that the defendant may be properly held liable for these services and disbursements, as well upon an implied assumpsit as if there had been an express contract, and we have not been referred to any authority to the contrary. The recovery in this case is, we think, correct."

That there is a custom between brother attorneys that services by one attorney, such as assisting in the preparation for and participating in the trial of another's case, shall be without compensation therefor in the absence of express agreement, was not pleaded nor proof thereof offered in this case. There is a substantial difference between the common practice of discussing the knotty questions in one's case with a brother attorney or the appearing for or assisting in the trial of a case where brother attorneys are plaintiffs or defendants and such a situation as here. And the shadowy nature of any custom or courtesy of not charging brother attorneys is indicated by what is said in such cases as *Thigpen v. Slattery,* 140 La. 707, 73 South. 780; and in the case cited in 2 Thornton, Attorneys, § 559 *(Graydon v. Stokes,* 24 S. C. 483, *supra),* where it is said: "The very fact that it is called *a courtesy* indicates that making no charge is exceptional, and that the general rule is to charge . . . and certainly the moment the parties, from any cause whatever, stand upon their rights, there can be no such thing as *courtesy* in the case."

If it be unethical and therefore, as here decided, illegal for one attorney to claim compensation for requested and rendered legal services from a brother attorney in the absence of express agreement, it appears to me to be just as unethical for an attorney to claim and recover compensation from an officer of the court, who had no expectation that he was to pay therefor, as he was allowed to do by this

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court in the case of the administrator defendant in *Miller v. Tracy,* 86 Wis. 330, 56 N. W. 866.

If the failure to speak of compensation for requested and rendered services by the brother at the bar to the brother at the bar works a forfeiture of any right to recover, the same ethical rule should govern the attorney in his relationship with others than attorneys. His standard should certainly be no lower for his actions with clients than with brother attorneys. Although entertaining, I hope, as high an opinion of the exalted nature of the duties and obligations of counselors at law as that expressed in the majority opinion, I cannot feel that they should be so set apart from the rest of mankind or that a rule which permits a brother of the blood to recover for requested services rendered to a brother of the blood who had no expectation of paying therefor, as was done in *Williams v. Williams,* 114 Wis. 79, 89 N. W. 835, *supra,* should not be as applicable to the relationship of brethren at the bar; the latter relationship surely calling for no more application of the golden rule than the former.

I am in accord with what is said by the majority as to the unpleasant disclosures of plaintiff's secret maneuvers with his brother in the matter of defendants' bill. It shows a want of the good faith required of him who is employed towards those who employ, and that is the alleged relationship upon which plaintiff predicates his right to recover. Whether his given reasons for so doing were valid and sufficient was a question for the jury. It would have been ample justification for the jury to have discredited his theory of employment or expectation of compensation on his part, but further than saying this an appellate court cannot well go.

I think, therefore, the court below was justified, both in law and in fact, when, in upholding the verdict, he said:

"I should have some difficulty in agreeing with the jury that there was an agreement between the parties that the defendants should become personally liable for plaintiff's services, but I cannot agree with defendants' counsel that there

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is no evidence from which the jury could find as they did upon that question."

I think, therefore, the judgment should be affirmed.

I am authorized to state that Mr. Justice KERWIN concurs in this dissent.

KONKEL, Plaintiff in error, vs. THE STATE, Defendant in error.

November 9, 1918—January 7, 1919.

Civil process: Exemption of persons in military service: Constitutional law: Validity of state statute: When federal law paramount.

1. Ch. 409, Laws 1917 (sec. 4232*a*, Stats. 1917), granting to persons in the military service of the United States or of this state exemption from civil process and the right to a stay of proceedings in civil cases pending against them, is not an exercise of the war power exclusively vested in Congress by sec. 8, art. I, Const. of U. S.
2. Nor does said statute conflict with amendm. XIV or with sec. 2, art. IV, Const. of U. S. The privileges and immunities of the act not being denied to citizens of other states by the express terms of the act, it applies to all such citizens.
3. Under its powers, expressly granted, relative to the army and navy, Congress may prescribe the conditions under which persons in the military service of the United States shall be subject to the process of courts, whether state or federal. So, also, a state may confer upon such persons certain privileges and immunities respecting the process of its courts. But when Congress has spoken fully on the subject, the federal statute supersedes that of the state in case of any conflict or difference between them.
4. Thus in a bastardy proceeding against a person in the military service of the United States, the provisions of the federal soldiers' and sailors' civil relief act (40 U. S. Stats. at Large, ch. 20), prescribing the conditions under which the delinquent father may be proceeded against, must govern, as against the more liberal immunity or exemption granted by sec. 4232*a*, Wis. Stats. 1917.

OWEN, J., dissents.

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ERROR to review a judgment of the civil court of Milwaukee county: A. J. HEDDING, Judge. *Affirmed.*

Bastardy. On March 2, 1918, a warrant was issued on a complaint charging the plaintiff in error, hereinafter called the defendant, with bastardy. He was arrested April 1, 1918, and at a preliminary hearing on April 8, 1918, he was held for trial and was tried on May 28, 1918. Upon the trial it was found that the defendant was the father of a bastard child born December 21, 1917, and he was adjudged to pay the sum of $50 lying-in expenses and to pay $15 a month for the support of the child until the child should arrive at the age of sixteen years. He was further required by the judgment to give a bond with sureties to secure the payment of the instalments, and in default thereof it was ordered that he be committed to the house of correction of Milwaukee county, there to be held until he should pay the sum specified in the bond or until otherwise discharged by law. Upon the trial the defendant claimed immunity from prosecution on the ground that he had been inducted into the military service of the United States on the 24th day of May, 1918, basing his claim upon the provisions of ch. 409, Laws 1917, published June 16, 1917. His claim was denied, and to review the judgment rendered against him the defendant has sued out a writ of error.

P. C. Kolinski, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney, and *Walter G. Wallschlaeger* and *Arthur G. Bartelt,* assistant district attorneys; and the cause was argued orally by *Mr. Wallschlaeger* and *Mr. Bartelt.*

ROSENBERRY, J. Assuming, without deciding, that the defendant was entitled to immunity under the terms of ch. 409, Laws 1917, we are led to the immediate consideration of the question whether or not said chapter is a valid enact-

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ment. It is known in the Wisconsin Statutes of 1917 as sec. 4232*a*, consisting of five subsections. Sub. 1 provides:

"All persons, residents of this state, now in the military service of the United States or of this state, and all those who may hereafter enlist, be appointed, or drafted into the military service of this state or of the United States, for the purpose of the present war, shall, during such service, be exempt from all civil process, and in all civil cases now pending against any person in such service, the proceeding shall be continued and stayed until the discharge of such person from such service," etc.

Sub. 2 requires the court, whenever it appears that a suit has been commenced against a person while in the military service, to dismiss such suit, and when it shall appear in any case now pending that the principal defendant is in such service, it shall be the duty of the court to stay the proceedings. Sub. 3 prescribes the manner in which proof of the fact that a person is in the military service of the United States may be established. Sub. 4 contains certain exceptions applying to executors, administrators, trustees, and foreclosures, where the person in the military service is not the main defendant. Sub. 5 provides that the time during which any person is exempt from the service of civil process under the provisions of the act shall not be taken as any part of the time limited by law for the commencement of a civil action, etc.

In behalf of the state it is claimed that ch. 409 is invalid (1) because it is an exercise of war power, which is exclusively vested in the United States; (2) because it violates the provisions of the Fourteenth amendment to the constitution of the United States, in that it is discriminatory as between residents of this state and residents of other states; (3) that said enactment is in conflict with the act of Congress known as the soldiers' and sailors' civil relief act and is therefore void and unconstitutional.

The contention that the enactment of ch. 409 is an exercise of the so-called war power by the legislature of the state

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of Wisconsin is not tenable. Ch. 409 might be enacted by the legislature of this state wholly independently of the fact that the United States is at war. The right to immunity is based upon the fact that the person proceeded against is in the military service of the United States. Many such acts were passed during the civil war, none of which, however, so far as we are able to discover, was passed upon by the United States supreme court. The courts of Pennsylvania held the act passed in that state constitutional. *Breitenbach v. Bush,* 44 Pa. St. 313; *Coxe's Ex'r v. Martin,* 44 Pa. St. 322.

The provisions of ch. 409 are not in conflict with the terms of the Fourteenth amendment as claimed; neither do its provisions offend against sec. 2, art. IV, of the federal constitution. The privileges of the act not being denied to the citizens of other states by the express terms of the act, it must be held to apply to the citizens of other states of the Union. The citizens of other states are entitled under the federal constitution to enjoy the same privileges and immunities as are conferred upon citizens of this state. Therefore, all the privileges and immunities conferred by the act upon the citizens of this state are conferred upon the citizens of other states, in the absence of language expressly limiting the act to citizens of this state. *Blake v. McClung,* 172 U. S. 239, 19 Sup. Ct. 165; *Estate of Johnson,* 139 Cal. 532, 538, 73 Pac. 424; *Slaughter-House Cases,* 16 Wall. 36, 77.

2. It is claimed that ch. 409 is void because it is in conflict with the soldiers' and sailors' civil relief act, passed by Congress March 8, 1918 (40 U. S. Stats. at Large, ch. 20). Sub. (1), sec. 101, of that act defines what is meant by the term "persons in military service;" sub. (2), what the period of military service is; sub. (3), to what the term "person" refers; sub. (4), what courts are included; sub. (5), what is meant by the term "termination of the war." Sec. 102 provides that the act shall apply to the United States, the several states and territories, the District of Columbia, and all

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other territories subject to the jurisdiction of the United States and to proceedings commenced in any court therein. Sec. 200 provides the method by which default judgments may be entered, provides a penalty for the making of false affidavits, payment of attorneys to represent persons in the military service, how judgments rendered against persons in the military service may be opened. Sec. 201 provides for a stay of any proceeding against any person in military service. Sec. 202 prohibits any fine or penalty being incurred by reason of the stay. Sec. 203 provides how a judgment in any action or proceeding commenced in any court against a person in military service before or during the period of such service or within sixty days thereafter may be stayed; sec. 204, the period of stay of actions where there are co-defendants; sec. 205, that the period of military service shall not be included in computing the time within which any action may be brought against a person in the military service; sec. 300, that no eviction shall be brought where the rent does not exceed $50 per month, how eviction proceedings shall be stayed, and the penalty for violation of the provisions of the section, and how the pay of the person in military service may be allotted for the payment of rent for dwelling purposes, etc. Sec. 302 relates to the enforcement of secured obligations. Sec. 600 relates to the transfer of property with intent to delay creditors. Sec. 603 provides that the act shall remain in force until the termination of the war and six months thereafter, and sec. 604 that the act may be cited as the "Soldiers' and Sailors' Civil Relief Act."

Our dual system of government has given rise to many difficult and perplexing questions. No boundary separating the field of federal from the field of state control can be marked out, for the reason that in many cases they overlap. The right to exercise certain powers has been conferred exclusively upon the United States. *Sturges v. Crowninshield*, 4 Wheat. 122, 193. In some instances the states are deprived of the right to exercise certain powers by reason of

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the fact that they have been conferred upon the United States. *Prigg v. Pennsylvania,* 16 Pet. 539, 622. In other instances it is said that the states may exercise powers conferred upon the United States until such time as Congress chooses to exercise them. *Houston v. Moore,* 5 Wheat. 1. There are certain fields within which the powers of the states are supreme and in which the United States cannot interfere with the exercise of the powers reserved to the states. *New York v. Miln,* 11 Pet. 102. In certain cases it is held, where the United States and the state have concurrent powers, that the exercise of the power of the United States is exclusive and the enactment of the state must stand aside. *Sturges v. Crowninshield, supra.* In certain other cases it is held that the enactments of both the United States and the state may stand together if there is in fact no conflict. *Asbell v. Kansas,* 209 U. S. 251, 28 Sup. Ct. 485; *Savage v. Jones,* 225 U. S. 501, 32 Sup. Ct. 715. In a particular case classification is often difficult, and the decisions of the federal as well as of the state courts are not always consistent.

In *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 117 N. W. 686, having under consideration state and federal regulation affecting interstate commerce, this court adopted the classification laid down in *Covington & C. B. Co. v. Kentucky,* 154 U. S. 204, 14 Sup. Ct. 1087, where the field is divided into three classes of legislative acts: First, where the states have plenary power, and Congress has no right to interfere. Second, cases of concurrent jurisdiction, where the states may act in the absence of Congressional action. Third, cases where the action of Congress is exclusive and in which the states have no power whether or not Congress has acted. This classification may not be applied with exactness in all cases.

There can be no doubt that Congress, in the exercise of the powers conferred upon it, may prescribe the conditions under which persons in the military service of the United

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States shall be subject to the process of courts, whether state or federal. Such provision seems necessarily implied from the provisions expressly granted, to maintain an army and navy. No question as to the validity of the soldiers' and sailors' civil relief act is raised, and we see no ground upon which its validity could be successfully assailed. It is equally within the power of a state to confer upon persons in the military service of the United States certain privileges and immunities respecting the process of its courts. The United States and the states have a concurrent right in respect to the subject matter here under consideration. The question then arises whether or not there is a conflict between ch. 409 and the soldiers' and sailors' civil relief act, for, if there be a conflict, the act of Congress, by par. 2, art. VI, of the federal constitution, is made the supreme law of the land. *Gibbons v. Ogden,* 9 Wheat. 1.

We think it must be held that the laws clearly conflict. *New York Cent. R. Co. v. Winfield,* 244 U. S. 147, 37 Sup. Ct. 546. In the first place, they speak upon identically the same subject matter; that is, the exemption of persons in the military service of the United States from the process of civil courts. The soldiers' and sailors' civil relief act prescribes what that exemption shall be in the courts of the United States and of the states, including the state of Wisconsin. Ch. 409 prescribes what that exemption shall be within the state of Wisconsin, and it prescribes a different exemption than that prescribed by the soldiers' and sailors' civil relief act.

It is argued that, because ch. 409 grants a more generous immunity or greater exemption than that granted by the soldiers' and sailors' civil relief act, there is no conflict within the principles laid down in *Savage v. Jones,* 225 U. S. 501, 32 Sup. Ct. 715, and in *McDermott v. Wisconsin,* 228 U. S. 115, 33 Sup. Ct. 431. Viewed from the standpoint of the person in the military service of the United States there may be some force to this argument, but he is not the

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only person concerned. In this case the defendant soldier is the father of a child which he is legally and morally bound to support. The United States prescribes the conditions under which the delinquent father may be proceeded against. Ch. 409 provides that he may not be so proceeded against. Upon what theory can it be said that there is no conflict between the two acts? Ch. 409 is not enacted in the exercise of the police power, so called, for the preservation of the health, morals, or promotion of the general welfare of the state, as were the regulations relating to stock food in the case of *Savage v. Jones, supra,* or the regulations relating to the sale of corn syrup in *McDermott v. Wisconsin, supra;* but ch. 409 stands upon an entirely different basis. The principles applicable to legislation relating to bankruptcy are applicable to this case. Congress having spoken fully on the subject, the power of the state to enact a law on the same subject is suspended. *Sturges v. Crowninshield,* 4 Wheat. 122, 196.

There is another principle applicable to the situation under consideration here, and that is that the regulation in respect to the service of civil process upon persons in the military service of the United States is of a purely national character. *Sturges v. Crowninshield, supra.* The orderly administration of the affairs of the army and navy requires that such regulations should be uniform. The military and administrative officers of the United States ought not to be required to look into the statute books of forty-eight separate states to determine what the privileges and immunities of United States soldiers are. Congress having, in the exercise of its constitutional powers, provided for the exemption of persons in the military service of the United States from process of civil courts of Wisconsin, it supersedes any like provision made by the state. *Selective Draft Law Cases,* 245 U. S. 366, 383, 38 Sup. Ct. 159.

It must be held that the laws referred to clearly conflict; that the soldiers' and sailors' civil relief act is the supreme

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law of the land, and so long as it remains upon the statute books of the United States the provisions of ch. 409, Laws 1917, are suspended. *Sturges v. Crowninshield, supra.* The right to proceed in a civil court against a person in the military service of the United States must be determined in accordance with the provisions of the soldiers' and sailors' civil relief act. Ample justice can be done to the defendant in this case under the provisions of that act. Sec. 203 provides:

"In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, . . . the court may, in its discretion, on its own motion, or on application to it by such person . . .

"(1) Stay the execution of any judgment or order entered against such person, as provided in this act, and

"(2) . . ."

Upon filing the *remittitur* in the trial court the defendant, if he be so advised, may apply to the court under the provisions of that section for a stay of proceedings.

By the Court.—Judgment affirmed.

The following opinion was filed February 8, 1919:

OWEN, J. *(dissenting).* Sec. 4232*a*, Stats., responds to a plain sense of justice and voices a humane public policy. It was enacted out of consideration for those who were about to leave their homes, their families, and their business affairs to fulfil the highest duties of citizenship. It was considered unjust to leave those who were called by the government on a mission of service and sacrifice in the interest of their country and of humanity to the mercy of inconsiderate creditors, and it was to save them from default judgments, foreclosure proceedings, forced sales, and their families from unconscionable evictions, that the law was passed. Moreover, in passing the law the state was not without a selfish interest. We are in a better position now than at the

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time the law was passed to understand the interest of the state in the welfare of the returning soldier and that of his family during his absence. The state is primarily and ultimately concerned with the care of its citizens and of those dependent upon them. In obedience to this duty the state has expended considerable sums of money during the last two years in the support of the dependents of those engaged in military service. Upon the state falls the financial burden of dependency. Upon the state falls directly the far heavier burden of the demoralization of its citizenry and of the social unrest which attend destitution and the denial of opportunity. The state has a direct interest in preserving the property status of those of its citizens who entered the military service so that upon their return they may find their property and their business as they left it and not be relegated to the army of unemployed to become dependencies of the state. As stated in the majority opinion, a law of this nature was upheld, during the civil war, in Pennsylvania, where it was called "An act to stay proceedings." *Breitenbach v. Bush,* 44 Pa. St. 313. That is not an inappropriate designation of sec. 4232*a*. A more comprehensive designation perhaps would be, "An act to suspend the right of civil process and to stay proceedings."

The subject is one over which the state has plenary power as an incident of sovereignty, except in so far as it may have been delegated to Congress. The power may be exercised by the legislature, except so far as it is limited by constitutional provisions. There are none such, except those relating to special or class legislation. The legislature may suspend the right of civil process against any class of its citizens in the interests of justice and in promotion of the general welfare where the classification is germane to the purposes of the legislation. There is no suggestion that those in the military service of the United States do not constitute such a class. I apprehend, also, that those not in the military service of the United States, but who have left their homes

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and businesses and with humane and patriotic motives engaged in the work of ministration and mercy to our stricken soldiers, such as nurses of the Red Cross, members of the Salvation Army, representatives of the Y. M. C. A., Knights of Columbus, and similar organizations, would form a legitimate classification for such legislative consideration. If so, then the legislature might grant immunity to the latter class, while, it is held, like consideration cannot be extended to those in the military service of the United States for the reason that the state's power in this respect has been delegated to Congress. While the result is ironical, the conclusion must be accepted if the premise be well founded. If such power has been delegated, it is by reason of the following provisions of sec. 8, art. I, of the constitution of the United States, declaring that Congress has power:

"[11] To declare War, . . .
"[12] To raise and support Armies, . . .
"[13] To provide and maintain a Navy;
"[14] To make Rules for the Government and Regulation of the land and naval Forces;
"[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
"[16] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
"[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

It will be conceded at once that these provisions do not amount to an express delegation of the power we are considering. At most it amounts to no more than an implied delegation of power to an extent necessary to carry into

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effect the powers expressly granted. Granting that, by implication, the power is delegated to Congress so far as may be necessary to successfully maintain an army and navy and carry on the military activities and undertakings of the government, it can be but a partial delegation of the power. The rest is reserved to the states. In other words, the power of Congress in such respect is exhausted when it has exercised the same so far as may be necessary for the promotion of its military interests. The power of the state to suspend civil process and to stay proceedings for state reasons, namely, as a matter of simple justice to its citizens, to promote the public welfare, and to secure the state against burdensome dependencies, still remains. The respective interests of the state and federal government in this subject are by no means identical. The purposes to be attained are quite different. The federal government is interested in the individual in his capacity as a soldier; the state government is interested in him in his capacity as a citizen. It seems self-evident that the consideration which the state may extend to its citizens in this respect is not limited by the military necessities of the federal government. The immunity which it may enforce does not mark the limit of immunity which the state may grant. I cannot escape the conclusion that even though the federal government has the power to legislate upon this subject so far as may be necessary in prosecuting its military undertakings, its power is limited to the accomplishment of such purposes, and that power to legislate upon the subject in their own interests and pursuant to their own policies still resides with the states.

But it is held in the majority opinion that the two laws under consideration are in conflict. If this be true, of course the state law must yield. But I confess my inability to discover a conflict. Laws are in conflict when, as pointed out in *Southern R. Co. v. Reid,* 222 U. S. 424, 32 Sup. Ct. 140, if one obey the state law he incurs the penalties of the federal law, and if he obey the federal law he incurs the penal-

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ties of the state law. In other words, they are in conflict when obedience to one involves violation of the other.

"A state statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the federal constitution unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Missouri, K. & T. R. Co. v. Haber,* 169 U. S. 613, 18 Sup. Ct. 488.

Such is not the case here. The enforcement of the state statute in no manner interferes with the accomplishment of the purposes sought by the federal legislation. Both may be enforced, and the accomplishment of the purposes sought by both the federal and state government secured. They may stand side by side, and the presence of one in no manner detracts from the force of the other.

The majority opinion of the court, as I understand it, proceeds on the theory that the federal enactment is to be construed as covering the subject, thereby excluding any further enactments on the part of the states with reference thereto. This construction obtains where full power to regulate the subject has been delegated to Congress, such as the power to regulate interstate commerce, and where the federal enactment affirmatively discloses the intent on the part of Congress that its regulation shall be exclusive. But even where full power has been delegated to Congress such intent will not be imputed to the Congressional act unless it clearly appears therefrom. As said in *Reid v. Colorado,* 187 U. S. 137, 23 Sup. Ct. 92:

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested."

There is nothing about the phraseology of the federal soldiers' and sailors' civil relief act to indicate such an intent. Neither can it be inferred from the purposes to be accomplished by its enactment. Plainly it was the purpose

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of Congress to secure certain immunity for soldiers and sailors. The securement of such immunity is not hindered by the voluntary action of the state in granting further immunity. Congress simply demanded such immunity as was required by its military exigencies and, in my opinion, had no power to demand any more. The granting of further relief on the part of the states was of no concern to Congress. Its power was to demand the immunity necessary for its military purposes. It had no power to forbid further immunity on the part of the state. But whether this be true or not, the circumstances under which the legislation was passed furnish no justification for the conclusion that by the enactment of the soldiers' and sailors' civil relief act Congress intended to forbid the states from granting further immunity to the special objects of its gratitude, and unless such an intent can be gathered from the act or from the purposes of its enactment, as said in *Reid v. Colorado, supra*, it will not be so construed.

Where there is a conflict between a state statute and a federal enactment a state court should not hesitate to acknowledge the supremacy of the federal act. The power of a state to enact legislation which it deems beneficial to its own interests, however, should not be lightly yielded. I feel that the decision in this case is a voluntary and unnecessary surrender of a sovereign power. I cannot join in the capitulation.

ANDREWS, Respondent, vs. FLUEKIGER and others, Appellants.

December 4, 1918—January 7, 1919.

Vendor and purchaser of land: Land contract: Foreclosure: Objections to title: Oral trusts: Direction as to what persons shall join in deed.

1. Objections to the title to be conveyed under an obligation to give a good or marketable title must raise at least a reasonable doubt as to the validity of the title upon a question of law or fact.

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2. Some years after a land contract to defendants had been executed by the holder of the legal title (Mrs. C.) and her sister (the plaintiff), who held a mortgage on the land, Mrs. C. conveyed the land to plaintiff subject to said contract. Thereafter a daughter of Mrs. C., by a written contract reciting that such conveyance was made by Mrs. C. without consideration and while she was incompetent and under duress, employed attorneys to have it set aside; and this contract, and also a conveyance by the daughter to the attorneys of an interest in the land, were recorded. In an action by plaintiff to foreclose the land contract it was conceded that at the time of its execution Mrs. C. was competent to contract, and the court found that there was no evidence of her subsequent incompetency or that her conveyance to plaintiff was not her free and voluntary act. *Held,* that the claims asserted by the daughter and her attorneys did not constitute any cloud upon or imperfection in the title which the defendants would receive under a conveyance to them pursuant to the land contract, and hence did not constitute a defense to the action.
3. No oral understanding at the time Mrs. C. conveyed the land to plaintiff that whatever might be left of the property after plaintiff had cared for Mrs. C. until her death should be transferred to Mrs. C.'s daughter could create any rights which might be asserted hostile or superior to those given the defendants by the land contract. [Whether, in view of sec. 2302, Stats., such an oral trust could be recognized or enforced at all, is not decided.]
4. A direction by the court in the foreclosure action that both the plaintiff and Mrs. C. should join in a warranty deed to be delivered to defendants upon payment of the purchase price, was proper and within the province of the court.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

The judgment appealed from is one in favor of the plaintiff for the foreclosure of a land contract. The plaintiff, *Cora M. Andrews,* and one Avis L. Chapman were sisters and lived together at all the times here in question. On August 8, 1907, Mrs. Chapman held the record title to about forty acres of unimproved land near the city of Beloit in Rock county, Wisconsin. Plaintiff, *Mrs. Andrews,* at that time held a mortgage against the same, executed to her by Mrs. Chapman. On said date a land contract was entered

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into by which the plaintiff and Mrs. Chapman agreed to sell, and the defendants *E. D. Fluekiger* and *E. J. Fluekiger* to buy, the said real estate upon the payment of $1,000 at or about the time of the conveyance, and the balance of $7,400 on or before December 1, 1907, with interest semi-annually upon any balance unpaid. No more than the $1,000 was paid on the principal sum, but defendants continued to pay interest thereon and in advance, the last payment being January 1, 1916, for interest up to July 1st of that year. The land contract contained a provision, in substance, that upon payment by the grantees of the agreed price, the grantors, "their heirs and assigns, and all and every person claiming or to claim any right, title, or interest under them in or to the lands and hereinafter mentioned, shall and will . . . by such conveyances, assurances, ways, and means in the law, as the party of the second part, their heirs and assigns, shall reasonably require, well and sufficiently grant, sell, release, convey, and assure to the party of the second part," etc., the land in question, with covenants "that the said premises, at the time of such conveyance, are free from all incumbrances and demands whatever, except the taxes . . . and with all other usual and reasonable covenants."

On October 22, 1914, Mrs. Chapman, being still the owner of the record title to said property, sold and conveyed the same by warranty deed to the plaintiff, with this condition inserted in such deed: "This conveyance is subject to a certain unrecorded contract for a deed entered into between the said grantor, *Edward F. Fluekiger* and *Ernest J. Fluekiger.*"

On the trial of this case in May, 1917, the plaintiff testified that she claimed the absolute ownership of the land and did not recognize any right of Mrs. Chapman in the land; that Mrs. Chapman, then seventy-four years old, was totally blind since before October 22, 1914, the date of the deed above mentioned, and that she had been living in plaintiff's home for sixteen or twenty years; that Mrs. Chapman had

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had a great deal of trouble in her life and had been taken care of by plaintiff, who also acted as her agent in business transactions and then had a substantial bill for such services; that Mrs. Chapman's condition was such that she used morphine for a great many years, which was administered to her by the plaintiff; that at the time of the deed to her in 1914 she, the plaintiff, drew the deed herself, and that no money passed between them that day; that the understanding between herself and Mrs. Chapman then was that if there was anything left of this property after plaintiff's taking care of Mrs. Chapman, she, the plaintiff, would transfer it or give it to Mrs. Chapman's daughter, Grace A. Johnston, who lived in New York city, and that she, the plaintiff, was perfectly willing that that should be done. That no one advised either of the sisters with reference to making such conveyance.

April 19, 1916, Grace A. Johnston made a contract and deed with Adams & Edgar, a firm of attorneys in Beloit, who are also attorneys for the defendants and appellants in this case; the contract reciting that the mother, Mrs. Chapman, until recently was possessed of considerable property consisting of land, notes, mortgages, etc., and that she, Mrs. Chapman, had attempted to convey and transfer the same without consideration, while incompetent and under duress, to her sister, said *Cora M. Andrews*, who now holds legal title thereto and claims full ownership against and adverse to the said Avis L. Chapman and Grace A. Johnston, and that should the claim of *Cora M. Andrews* not be disputed and the evidences of such ownership not set aside, Grace A. Johnston would be deprived of any right, title, or interest in or to such property, and the rights of the said Grace A. Johnston as sole heir and distributee of the said Avis L. Chapman would therefore be wholly defeated; and that she desired to set aside such deeds or conveyances and to take the necessary action in court or otherwise, and that such attorneys at law were to be employed to protect her interests

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and to take all necessary or proper steps, and in consideration thereof she agreed to give them an undivided one-third interest in any such property, real or personal, to which she had present title or that she might thereafter acquire. By deed of the same date she conveyed to the said Adams & Edgar an undivided one-third in and to an undivided one-half interest in the property concerned herein as well as other property. On May 1, 1916, the said deed and contract were recorded in the office of the register of deeds of Rock county, and on May 2d Grace A. Johnston began proceedings in the county court of Rock county to have a guardian appointed for her mother, Mrs. Chapman, on the ground that she was incompetent to take care of her property.

July 31, 1916, this action was commenced to foreclose the land contract of 1907.

December 16, 1916, after hearing in the county court, the guardianship proceedings were dismissed, the county judge determining that the preponderance of testimony presented to him was to the effect that Mrs. Chapman was not incompetent, and he found, therefore, that she was competent and dismissed the petition. He also expressed the opinion that the hearing fixed a legal liability upon *Mrs. Andrews* which was lacking before, referring to the testimony given by the plaintiff in that proceeding substantially as repeated by her in the trial in this case and as quoted before. This was also supplemented there by testimony of Mrs. Chapman herself, in which Mrs. Chapman affirmed her satisfaction with the arrangements made between herself and the plaintiff, which included the conveyance of October 22, 1914.

The defendants interposed as defense in this case that by reason of the situation and transactions between the plaintiff and Mrs. Chapman, the relationship of Grace A. Johnston, and by reason of the recording of the contract and deed between Grace A. Johnston and the attorneys, Adams & Edgar, there was such a cloud upon or imperfection that any title that could be given by any present conveyance from the

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plaintiff would not meet the covenants of the land contract and would not be such a marketable title as the defendants could or ought to be compelled to accept. That it appears from said contract the said Grace A. Johnston and Adams & Edgar assert a right and claim against the land affected by said contract adverse to and superior as to part of said land to the title and right of the plaintiff and Avis L. Chapman. That other claims are made by said three persons, claiming adverse and superior rights to a portion thereof to the plaintiff and Avis L. Chapman, which would entirely deprive plaintiff of at least a portion of said land or at least seriously incumber and cloud her title thereto. They also allege that they had tendered back quitclaim deeds of the property, and they demanded that the contract be canceled and that they have judgment for all sums paid by them for principal and interest and taxes.

The trial court found in effect that neither said Grace A. Johnston nor the attorneys, Adams & Edgar, have any interest whatever in or claim to the real estate or to the purchase price thereof to be paid by the defendants to plaintiff under and pursuant to the terms of the land contract; that there was no evidence in this case that on October 22, 1914, or at any other time, Mrs. Chapman was incompetent to transact business or that her deed of that date to plaintiff was the result of incompetency on her part, or a fraud, actual or constructive, duress, or undue influence of the plaintiff, nor is there any evidence to show that there is any possibility of establishing that said deed was not the free and voluntary act of said Avis L. Chapman. He also found the amount due on the land contract, and provided that sixty days from the date of the entry of judgment is a reasonable time for performance by defendant.

As conclusions of law the court found that there was no cloud upon the title of the plaintiff; that she was entitled to judgment against the defendants providing for the payment within sixty days of the $7,400 due, together with interest,

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and upon default that they be forever barred; and further, provided that there should be filed with the clerk of the court, to be turned over to defendants, upon their payment of the amount due, a warranty deed of said premises executed by both the plaintiff and Mrs. Chapman.

By the judgment entered thereupon it appears that such a warranty deed, executed by both the plaintiff and Mrs. Chapman, was left with the clerk under instructions to deliver the same to the defendants upon the payment of the amount found due under the judgment.

From the judgment so entered defendants appeal.

For the appellants there was a brief by *H. W. Adams* and *W. S. Rundell,* both of Beloit, and oral argument by *Mr. Adams.*

For the respondent there was a brief by *Jeffris, Mouat, Oestreich & Avery* of Janesville, and oral argument by *O. A. Oestreich.*

ESCHWEILER, J. It was conceded on the trial and found by the court to be the fact, that at the time of the execution of the land contract in 1907 all the parties thereto were competent to contract, and it is unquestioned that a good and merchantable title could have been then conveyed. So that if there be any cloud or incumbrance upon the title to this property it must be based upon facts occurring or situations arising subsequent to the execution of said land contract.

So far as defendants were concerned, their rights under the land contract of 1907 were not impaired or altered by the conveyance from Mrs. Chapman to the plaintiff in 1914. That conveyance being expressly made subject to this land contract, the grantee, the plaintiff herein, could not assert thereunder rights adverse or superior to those of defendants. Besides, both grantor and grantee in the warranty deed of 1914 were grantors in the land contract and under covenant therein to convey all the title either of them had to defendants. So that were the daughter, Grace, able to have this

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warranty deed from her mother to her aunt set aside, it would avail nothing as against the rights of the defendants under the concededly valid land contract; at most such setting aside would go only to the question of the disposition to be made of the proceeds upon payment by defendant of the purchase price.

The assertion, therefore, by a stranger to the record title of any claim of right to have the warranty deed from sister to sister, recognizing as it did the land contract, set aside, was without sufficient substance to warrant it being considered any impairment of the title that the defendants would receive under the warranty deed provided for in the judgment herein.

The direction of the court below that both the plaintiff and Mrs. Chapman should join in the warranty deed to be delivered to defendants upon payment of the purchase price, and which condition, it appears, has been complied with, was clearly the proper thing to do and within the province of the court in this action. *McIndoe v. Morman,* 26 Wis. 588; *Emerson v. Schwindt,* 114 Wis. 124, 89 N. W. 822.

It being apparent from the record that even were the daughter, Grace, to have the fruition of the hopes she apparently entertained in making the contract and deed with and to her attorneys in April, 1916, as to the property rights of her then living mother subsequently coming to her as a surviving and only child of Mrs. Chapman, she did not then have, nor could she afterwards receive, any rights in this real estate superior to those Mrs. Chapman had, and at this time Mrs. Chapman had herself carved out from the fee the interest secured to defendants by the land contract.

The objection to a title to be conveyed under an obligation to give a good or marketable title must raise at least a reasonable doubt as to the validity of the title upon a question of law or fact. *First A. M. E. Soc. v. Brown,* 147 Mass. 296, 17 N. E. 549; 39 Cyc. 1456; *Kahn v. Chapin,* 152 N. Y. 305, 46 N. E. 489; *Lamotte v. Steidinger,* 266

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Ill. 600, 107 N. E. 850; *Tripp v. Sieler,* 38 S. Dak. 321, 161 N. W. 337, 39 S. Dak. 221, 164 N. W. 67. There was material substance to the objections raised and passed upon in the cases in this court, such as a building restriction in *Neff v. Rubin,* 161 Wis. 511, 154 N. W. 976; a sheriff's deed, *Stack v. Hickey,* 151 Wis. 347, 138 N. W. 1011; a recorded plat covering the same property and claim of title thereunder, *Suring v. Rollman,* 145 Wis. 490, 130 N. W. 485; title to part based upon claim of adverse possession and not record title as represented, *Zunker v. Kuehn,* 113 Wis. 421, 88 N. W. 605; defective acknowledgment so as to prevent recording, *Harrass v. Edwards,* 94 Wis. 459, 69 N. W. 69.

We can see no more weight to be given to the other proposition urged by appellants, viz. that by what was admitted by plaintiff's testimony here and in the guardianship proceedings in the county court was understood between the two sisters at the time of the deed to plaintiff in October, 1914, *i. e.* that what was left of the property after caring for Mrs. Chapman was to be transferred to Grace Johnston, such a trust was created in her favor as made an incumbrance or cloud upon any title that the plaintiff might attempt to convey. It is unnecessary to and we therefore do not determine whether any such agreement resting in parol could be recognized or enforced, in face of the provisions of sec. 2302, Stats., requiring all estates or interests in land, other than leases for a term not exceeding one year, to be in writing. See *Ill. S. Co. v. Konkel,* 146 Wis. 556, 566, 131 N. W. 842; *Richtman v. Watson,* 150 Wis. 385, 391, 136 N. W. 797. Such question is of no materiality here, for in no event could any rights be asserted hostile or superior to those given defendants by the land contract, for the trust, if any such was created, could not be so asserted as to contradict or nullify the express language of the warranty deed under which, if at all, it gets vitality. That instrument expressly subjects the rights thereby given to the rights of the land contract. If Grace A. Johnston claims any interest

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created by this warranty deed, she cannot claim as against its express terms limiting its extent.

We are satisfied, therefore, that the trial court was entirely right in holding that there was no such cloud or *bona fide* claim against the title that could be conveyed by the warranty deed provided for in the judgment from the plaintiff and Mrs. Chapman that would make it less than the good and marketable title the defendants were entitled to under their land contract.

By the Court.—Judgment affirmed.

ST. JOHN'S MILITARY ACADEMY, Respondent, vs. LARSON, County Treasurer, Appellant.

December 4, 1918—January 7, 1919.

Venue: Clerical error: Income taxation: Exemption: Educational corporation conducted for pecuniary profit.

1. A manifest clerical error in entitling an action as one in M. county circuit court instead of one in W. county circuit court was properly disregarded by the latter court.
2. Where an educational corporation organized to conduct a private enterprise on the plan of a profit-sharing corporation, with capital stock owned by shareholders, receives from its business an annual income in excess of its expenses and applies the excess to improving its properties, thus enhancing the value of the holdings of the stockholders, its income is not exempt from taxation under sub. 2, sec. 1087*m*—5, Stats.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

This is an action brought by *St. John's Military Academy,* a school for boys located at Delafield, Wisconsin, to restrain the defendant, as treasurer of Waukesha county, from selling certain property of the plaintiff for unpaid taxes.

The complaint alleges, in substance, that the plaintiff is possessed of personal and real property amounting to about $100,000, with debts of about $75,000; that this property

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has been used solely for the purpose of conducting the school, and that no dividends have ever been declared by the plaintiff to its stockholders at any time since its incorporation, except the dividends which were declared and paid by it to its stockholders in the years 1900 and 1901 out of the profits accruing from the business of conducting the school in such years; that as a rule there has been a profit each year in conducting the school, but that with the exception of the years just mentioned this profit has always been used to make improvements to the property or in decreasing the debt of the plaintiff. The plaintiff further alleges that heretofore, in an action brought by this plaintiff in this court, entitled "The St. John's Military Academy vs. Joseph Edwards, as Treasurer of the County of Waukesha," the supreme court held (143 Wis. 551) that the plaintiff was a scientific and literary corporation within the meaning of sec. 1038, Stats., and that as such its real and personal property was exempt from taxation under the provisions of sec. 1038, Stats.; that since the rendering of such decision such exemption from taxation has been recognized by the authorities of the town of Delafield and the county of Waukesha, and that no taxes or assessments have been levied against the property of this plaintiff; that, however, since the enactment of the income tax law of the state of Wisconsin (ch. 658, Laws 1911, and amendments thereto) the authorities of the state and the county of Waukesha have claimed that the plaintiff was liable for an income tax upon any surplus remaining over and above the payment of its running expenses from its tuition fees received by it in any one year. The plaintiff alleges that it is exempt from the payment of any such income tax under the provisions of sec. 1087*m*—5; and that the tax bills for the alleged income tax for the years 1911, 1912, 1913, and 1914 are in the hands of the defendant, who threatens to sell the real estate of this plaintiff and to distrain the personal property of the plaintiff in order to enforce the collection of the alleged income tax; wherefore

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the plaintiff asks that the court enter an order restraining the defendant from selling or offering for sale any of its property for the payment of the alleged income tax.

The defendant demurred to the complaint on the grounds that it did not on the face thereof state facts sufficient to constitute a cause of action.

Plaintiff and defendant entered into a stipulation that the issue be presented to the court whether, under the facts set forth in the complaint, the plaintiff is exempted from the assessment or payment of an income tax. The defendant waives the issue as to whether or not plaintiff has an adequate remedy at law.

The court entered an order overruling the demurrer of the defendant, from which order this appeal is taken.

For the appellant there was a brief by *M. S. Tullar,* district attorney, and *Tullar & Tullar* of Waukesha, of counsel, and oral argument by *E. E. Brossard,* assistant attorney general, and *D. S. Tullar.*

For the respondent the cause was submitted on a brief signed by *Jackson B. Kemper* of Milwaukee, of counsel.

SIEBECKER, J. The court properly disregarded the clerical error in entitling the action as one in "Milwaukee County Circuit Court" in place of "Waukesha County Circuit Court." The whole record and proceeding had in the action show that the parties understood that it was an action pending in the latter court and that the insertion of the word "Milwaukee" was manifestly an error.

The real and personal property of the plaintiff, used exclusively for the purposes of conducting its school and not being leased or otherwise used for pecuniary profit, was held exempt from taxation under sec. 1038, Stats., in an action by plaintiff against Edwards, county treasurer of Waukesha county (143 Wis. 551, 128 N. W. 113). That statute provides that the personal property of such a school and the real property, not exceeding ten acres, on which its buildings

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are located are exempted from taxation, "provided such real or personal property is not leased or otherwise used for pecuniary profit." In the decision in the *Edwards Case* it was determined that the plaintiff is a scientific and literary association within the meaning of this statute and that its school properties were not leased or otherwise used for pecuniary profit at the time the tax there involved was assessed against it and that it was not subject to direct taxation. The income tax statute (sub. 2, sec. 1087*m*—5) involved in this action exempts from taxation the "income . . . of all religious, scientific, educational, benevolent or other corporations or associations of individuals not organized or conducted for pecuniary profit." The plaintiff is incorporated for the purpose of establishing and conducting its school, and, as its articles of incorporation declare, owns and deals in real estate and all kinds of personal property and does all things necessary and exercises all powers incident to the business purpose specified in its articles. The complaint shows that it receives an annual income which exceeds the annual current expenses of conducting the school and that such excess of its income has been applied to pay the costs of enlarging its buildings and in improving its properties, and that in 1900 and 1901 it declared a small dividend on its stock. Its articles of incorporation provide that its capital stock shall be $15,000, the number of its shares 100, and the amount of each share $150. As appears from the foregoing statement, the properties have increased in value to upwards of $100,000, bearing an indebtedness of $75,000. It is to be observed that the above income tax exemption statute includes only such corporations of the classes specified which *"are not organized or conducted for pecuniary profit."*

Manifestly if any corporation of the kinds named in the statute is organized as a pecuniary profit-sharing institution, or if not so organized is being conducted for pecuniary profit, then its income is subject to taxation under the income

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tax statutes. The plaintiff's articles of incorporation show that it is organized to conduct a private enterprise upon the plan of a profit-sharing corporation, with capital stock owned by its shareholders, and that its business yields an income in excess of the annual amount required for its current running expenses to conduct the school, and that such excess has been devoted to enlarge its properties and thus has materially enhanced the value of its capital stock, resulting in a pecuniary profit to the stockholders. The complaint shows that the plaintiff is organized as a profit-sharing corporation and that the conduct of the business has resulted in enhancing the holdings of the stockholders. Within the terms of sub. 2, sec. 1087*m*—5, it is a corporation organized and conducted for pecuniary profit and hence its income is not exempt from taxation. The trial court improperly overruled the demurrer to the complaint.

By the Court.—The order appealed from is reversed, and the cause remanded to the circuit court with direction to enter an order sustaining the demurrer and for further proceedings according to law.

ESTATE OF JUDSON: PATTERSON and others, Appellants, vs. FULLER, Administrator, and another, imp., Respondents.

December 4, 1918—January 7, 1919.

***Wills**: Implied revocation: Death of all beneficiaries: Nature of estate given: "Heirs and assigns:" Evidence to show intention, contrary to will: Refusing probate: Harmless errors.*

1. Where all the beneficiaries named in a will, none of whom was related to the testator, died during his lifetime, the will was impliedly revoked and became inoperative.
2. Where by such will property was given to persons named "and to their heirs and assigns," the latter words were merely words of limitation, descriptive of the nature of the estate given; and no estate passed to such heirs or assigns.
3. The language of the will being plain and certain in meaning, testimony to show that the testator intended that in case of

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the death of the beneficiaries the property should go to their heirs was not admissible.

4. There was in such case no material error or irregularity in denying probate to the will when it was first presented, rather than admitting it to probate and afterwards holding it inoperative because there were no beneficiaries who would take under it.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an appeal from a judgment entered in the court below on the 25th day of February, 1918, refusing probate of an instrument propounded as the will of Isaac N. Judson, deceased, and appointing an administrator in said estate.

The petition for administration, among other things, stated upon information and belief that a certain instrument in writing purporting to be a will of said deceased existed, and that petitioner had no information as to the validity thereof, therefore alleged the same to be invalid; and further alleged that the beneficiaries and persons named as executors all predeceased said Isaac N. Judson and were in no way related to him.

The county court ordered a hearing of the petition and directed notice to be given, which was done. The order for hearing provided that at the time and place of hearing the matter of admission of said instrument as the last will of deceased and all other matters and things as to the effect and validity of said instrument be adjudged and determined.

After hearing in the county court the court ordered and adjudged that the instrument propounded for probate as the will of Isaac N. Judson, deceased, was revoked by reason of the death of John Patterson and Andrew Aitken during the lifetime of said Isaac N. Judson, and denied the probate thereof; and further decreed that said Isaac N. Judson died intestate, and ordered that administration of his estate be granted.

The circuit court found that Isaac N. Judson died May 3, 1917, leaving an instrument propounded for probate, dated

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March 16, 1878, and being the instrument whose admission to probate is requested by the heirs of John Patterson and Andrew Aitken; that said instrument was duly executed as required by law, and that Isaac N. Judson was of full age, sound mind, and competent, and not under any undue influence or restraint; that John Patterson, who was named as executor and one of the beneficiaries, was not related by blood or marriage to Judson, and died leaving as his heirs at law *Jennie P. Milham, Clara J. Patterson,* and *Chauncey J. Patterson;* that John Patterson died May 30, 1891, and continuously lived in Waukesha up to the time of his death; that Andrew Aitken, one of the executors and beneficiaries, was not related in any way to Judson, and died June 20, 1906, having been a resident, continuously, of Waukesha, Wisconsin, and left him one child surviving, *Edith M. Aitken;* that Judson, at the date of execution of his will March 16, 1878, resided on property owned by him just outside of Waukesha, Wisconsin, and continued to live there up to about two years prior to his death, when he became an inmate of the poorhouse, where he resided at the date of his death.

As conclusions of law the court found that said instrument so propounded for probate "was revoked by reason of the death of said John Patterson and of the said Andrew Aitken during the lifetime of said Isaac N. Judson, and thereupon said instrument became and was null and void;" that Isaac N. Judson died intestate; that probate of said instrument as the last will of said Isaac N. Judson be denied and administration be granted to *Milton A. Fuller.*

For the appellants the cause was submitted on the brief of *Frame & Blackstone* of Waukesha.

For the respondents there was a brief by *V. H. Tichenor* of Waukesha, attorney for the administrator, and *Tullar & Tullar* of Waukesha, attorneys for *Frank Welton.*

KERWIN, J. The will in this case became inoperative because the legatees named therein predeceased the testator,

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therefore it was proper to grant administration upon the estate of the alleged testator, Isaac N. Judson.

The principal question involved here is whether there was an implied revocation of the will. It seems to be well settled at common law that where the legatees all predecease the testator all the provisions of the will lapse and it becomes impliedly revoked. *Cleaver v. Cleaver,* 39 Wis. 96; *Koerber v. Patek,* 123 Wis. 453, 102 N. W. 40; *Estate of Sander,* 126 Wis. 660, 105 N. W. 1064; *Wapello Co. v. Eikelberg,* 140 Iowa, 736, 117 N. W. 978.

This rule is modified by our statute, sec. 2289, which provides:

"When a devise or legacy shall be made to any child or other relation of the testator and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have taken if he had survived the testator unless a different disposition shall be made or directed by the will."

In the instant case the legatees named in the will were not related to the testator. But it is insisted that the intention of the testator as shown by the terms of the will, in connection with the evidence in the record, shows that the legacies were given to the legatees, their "heirs and assigns," hence the heirs of the legatees take.

It is clear under the authorities that the words "heirs and assigns" are merely words of limitation, descriptive of the nature of the estate given to the legatees. *Cleaver v. Cleaver,* 39 Wis. 96; *Van Beuren v. Dash,* 30 N. Y. 393, 414, 415; 2 Alexander, Wills, § 774. It follows, therefore, that by the express terms of the will no estate passed to the heirs of John Patterson and Andrew Aitken, legatees, they having predeceased the testator.

It is insisted by appellants that the testator intended that his property should go to the named legatees and in case of their death to their heirs. The language of the will is very

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plain; there is no uncertainty in the meaning of the language used, and under the established principles of law the heirs of the legatees named took no interest in the testator's property. Testimony to show a contrary intention was not admissible.

"It is only where uncertainty of sense is clearly apparent, in testamentary as in other instruments, that judicial construction is required or permissible." *Holmes v. Walter,* 118 Wis. 409, 95 N. W. 380; *Mitchell v. Mitchell,* 126 Wis. 47, 105 N. W. 216; *Flint v. Wis. T. Co.* 151 Wis. 231, 138 N. W. 629; *Will of Owens,* 164 Wis. 260, 159 N. W. 906.

In *Will of Ehlers,* 155 Wis. 46, 143 N. W. 1050, relied upon by appellants, after discussing the rule the court said:

" . . . all in harmony with the rule that the legal intention of the testator is the one expressed by his language, though it may not be exactly the real intention he had in mind,—that his purpose can be given vitality only so far as it can be read reasonably out of the will. . . ."

There was no competent evidence offered or received in the instant case sufficient to show an intention contrary to that expressed by the plain language of the will.

It is further insisted that the court erred in matter of procedure in denying, in the first instance, the will to probate. The point is untenable. It was immaterial in this case whether the will was denied probate on the first hearing in the matter or later. The court had jurisdiction to determine whether the testator died testate or intestate when the matter was first presented as well as later. *Tryon v. Farnsworth,* 30 Wis. 577; *Carpenter v. U. S. F. & G. Co.* 123 Wis. 209, 101 N. W. 404.

Whether there was any irregularity in not first admitting the will to probate and then determining whether or not there were beneficiaries who would take the property on final settlement, appellants were not prejudiced thereby.

We find no prejudicial error in the record.

By the Court.—The judgment is affirmed, with costs.

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PUFFER, Executor, Appellant, vs. MERTON and others, Respondents.

December 5, 1918—January 7, 1919.

Partnership: Attorneys at law: Death of one partner: Right of his estate to share in compensation for subsequent work: Contract construed.

1. The conducting to a conclusion of business in the hands of a law firm at the time of the death of a partner is not simply a winding up of the partnership, but is a continuation of business after the partnership has ceased to exist; and equity does not require that the estate of the deceased partner, which has contributed nothing toward the work of completing such business, should share in the compensation for such work.
2. Upon the death of a partner in a law firm and the purchase by a surviving partner of the tangible property of the estate which had been used in the business, the estate ceased to have any money interest in the business; and there being no contingent-fee cases then in the hands of the firm, but only business held on the usual general retainer basis, the estate was not entitled to any share of the compensation received for work thereafter done.
3. A provision in the partnership agreement of a law firm that "in case of the dissolution of said firm the said N. and J. [members of the firm], or either of them, are to have no interest in the outstanding accounts of said firm," was properly construed to refer to a voluntary dissolution only and not to a dissolution by death of a partner.

APPEAL from a judgment of the circuit court for Waukesha county: CHESTER A. FOWLER, Judge. *Affirmed.*

Action for an accounting between the executor of the will of T. E. Ryan, deceased, and the defendants as surviving partners of the law firm of Ryan, Merton, Newbury & Jacobson. Immediately after the death of Mr. Ryan *Mr. Newbury* purchased from the executor of his estate all the tangible property belonging to it which had been used in the partnership business. The circuit court held that the estate was not entitled to share in the proceeds received for legal services rendered after Mr. Ryan's death, and construed the partnership agreement to entitle Messrs. *Newbury* and *Ja-*

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cobson to their proportionate interest in the accounts of the firm outstanding at the time of Mr. Ryan's decease. From a judgment entered accordingly the plaintiff appealed.

The cause was submitted for the appellant on the brief of *Grady & Farnsworth* of Portage, and for the respondents on a brief signed by *Miller, Mack & Fairchild* and *Thomas M. Kearney,* all of Milwaukee.

VINJE, J. Broadly stated, plaintiff's claim is that upon the death of Mr. Ryan it became the duty of the surviving partners to conduct all business then in its hands to a conclusion and to permit his estate to receive its proportionate share of the proceeds received for such services. This claim is rested chiefly upon an alleged analogy between the winding up of the affairs of an ordinary mercantile partnership and that of finishing business in the hands of a law firm upon the death of a partner. The analogy, however, does not hold. In a mercantile firm the financial interest or assets of the estate remain to earn or enhance profits. Not so here. *Mr. Newbury* bought the tangible property of the Ryan estate and it had no money interest in the business to earn profits. In a mercantile firm there are usually contracts and other obligations in which the firm has a vested interest and is entitled to enforce, a part of which interest belongs to the estate of the deceased partner. In this case it appears that the firm had on hand no contingent-fee cases, but that all business held by it was on the usual general retainer basis. Its clients could, therefore, dispense with the services of the firm at any time by a payment therefor in full to the date of discharge. Neither can it be said that the conducting to a conclusion of law business on hand at the time of the death of a partner is simply a winding up of the partnership. It is more than that: it is a continuation of business after the partnership has ceased to exist. Often such continuation may require years of hard work for completion. Hence it is not equitable that the estate of a deceased partner which

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has contributed nothing toward such work should share in its compensation. *Rowell v. Rowell,* 122 Wis. 1, 99 N. W. 473.

We think the trial court properly construed the partnership agreement to refer to a voluntary dissolution, and not to one by death, where it provided that "in case of the dissolution of said firm the said *Newbury* and *Jacobson,* or either of them, are to have no interest in the outstanding accounts of said firm." Elsewhere in the recitals the partnership agreement speaks of such accounts belonging to Ryan and *Merton.* Ryan and *Merton* were to determine the policy of the partnership. If either of them withdrew, his interest in the partnership must first be offered to the other. They reserved the right to dissolve the partnership at any time. It is quite evident that the senior partners desired to retain the control and interests of the firm as against any voluntary action of the new members, and that voluntary dissolution only, and not dissolution by death, was contemplated as coming within the terms of the partnership agreement.

We have not deemed it necessary to discuss the law applicable to the rights of estates of deceased partners generally in partnership assets or the duties of the surviving partners to wind up the business without expense to the estate, because the facts in this case do not bring it within the general rule. Having reached the conclusion that the trial court was right as to the two matters treated, the balance of plaintiff's contentions fall therewith.

By the Court.—Judgment affirmed.

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KESKE, Respondent, vs. BOEDER, Appellant.

December 5, 1918—January 7, 1919.

Sales by auction: Conditions announced bind all bidders: When sale is complete and absolute: Mistake of auctioneer: Evidence.

1. Auction sales are subject to the conditions announced by the auctioneer at the opening of the sale, which bind all bidders whether they actually heard them or not.
2. Sub. (2), sec. 1684*t*—21, Stats., providing that "a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner," does not conflict with the rule above stated.
3. Where at the opening of a public sale the auctioneer announced that in case he made a mistake he reserved the right to resell the property, it was not necessary, in order to prevent a sale from being absolute, that there should have been a mutual mistake.
4. A declaration by the auctioneer, in such case, that he had made a mistake in the sale of a horse was not conclusive upon the parties, but the fact should be determined upon a consideration of all the circumstances.

APPEAL from a judgment of the county court of Dodge county: WILLIAM H. WOODARD, Judge. *Reversed.*

The parties hereto are farmers residing in Dodge county. The defendant advertised a sale of stock, machinery, and other personal property to be held September 22, 1917. The sale was conducted by one Eli Keel as auctioneer. A horse was brought out of the defendant's barn by an employee of the defendant and offered for sale by the auctioneer. The plaintiff made an offer of $25, which was the only offer received. After some effort to secure another bid the auctioneer declared the animal sold to plaintiff. So far the facts are not disputed. On behalf of the defendant it is claimed that the auctioneer, at the opening of the sale, announced that in case he made a mistake he reserved the right to resell the property. It is further claimed by the auctioneer, on behalf of the defendant, that he supposed the animal in ques-

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tion belonged to the plaintiff, *Keske,* and that *Keske* had made the bid for the purpose of bidding in the animal if a better price should not be offered, and that had he known that the horse was in fact the property of the defendant he would not have struck it off to *Keske.* The auctioneer, upon discovering his mistake, claimed the right to resell the animal, which he did, against the protest of the plaintiff, and the animal was resold to another bidder for $125. On behalf of the plaintiff it is claimed that the right to resell in case of a mistake was not reserved; that there was in fact no mistake; and that under the terms of the sales act the title to the property in question passed to the plaintiff, and that he was entitled to recover the actual value of the property less the $25 bid for it by him. The disputed questions of fact were submitted to the jury, which rendered a general verdict in favor of the plaintiff and assessed his damages at $100. From judgment entered thereon the defendant appeals.

For the appellant there was a brief by *Clark & Lueck* of Beaver Dam, and oral argument by *Royal F. Clark* and *A. W. Lueck.*

For the respondent there was a brief by *Clifford & Hartman* of Juneau, and oral argument by *Eugene A. Clifford.*

ROSENBERRY, J. The court in submitting the case to the jury instructed them that the plaintiff was entitled to recover unless it should appear that there was a mutual mistake. After defining mutual mistake the court said:

"If you find that the defendant, *Boeder,* was laboring under such mistake and that the plaintiff, *Keske,* was not, then, regardless of the price paid for the property, it is your duty to find for the plaintiff and assess such damages as you shall find from the evidence he is entitled to; if not, you should find for the defendant."

The court further instructed the jury that

"the laws of our state provide that a sale by auction is com-

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plete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. The word 'sold' would be and is a sufficient announcement of the completion of the sale."

Sub. (2), sec. 1684*t*—21, Stats., provides:

"A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve."

It is argued that this provision of the sales act gives the sale a conclusive character, and that the sale is not affected by any conditions announced by the auctioneer excepting those alone which relate to the terms of payment. That part of the sales act referred to simply states the law as it was prior to its enactment. Auction sales have always been subject to the conditions announced upon the opening of the sale by the auctioneer, which are held to bind all bidders whether they in fact heard them or not. *Kendall v. Boyer,* 144 Iowa, 303, 122 N. W. 941, and note; 6 Corp. Jur. 827; 2 Ruling Case Law, p. 1123, § 8. We are cited to no authority, nor are we able to find any, holding that the auctioneer at the beginning of the sale may not announce other conditions than those relating to payment.

This case was tried on the theory that the sale was absolute unless there was a mutual mistake. There was no evidence of mutual mistake. The real question at issue, as disclosed by the evidence, is whether or not the auctioneer made the announcement claimed at the beginning of the sale, and, if he did make such announcement, whether or not there was in fact a mistake on his part. We refrain from comment upon the testimony in view of the fact that there must necessarily be a new trial. The law applicable to such a situation is plain. The fact must be determined upon a consideration of all the circumstances, as the declaration

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of the auctioneer as to his mental processes cannot be conclusive upon the parties.

By the Court.—Judgment reversed, and cause remanded for a new trial.

KARLS, Respondent, vs. DRAKE, Appellant.

December 3, 1918—January 7, 1919.

Vendor and purchaser of land: Statement as to value: Expression of opinion or representation of a fact.

1. A statement as to the value of land, made by the vendor to the purchaser, was not a mere expression of opinion but a representation of a fact where the purchaser, under all the circumstances of the case, was justified in relying thereon.
2. It is not the rule, in such a case, that a statement concerning value is to be regarded as a representation of a fact only where the purchaser is induced by artifice, trick, or fraud to rely thereon. *Horton v. Lee*, 106 Wis. 439, explained.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

In the summer of 1914 *Mathias Karls* was the owner of eighty acres of land in Adams county, Wisconsin. The defendant, *Clarence Drake*, was the owner of certain real estate in the city of Madison, Wisconsin. One day, while engaged in carpenter work at Black Earth, Wisconsin, he was called on the telephone and asked to come to Madison. He came on an evening train and went to the office of a real-estate agent, where he found *Mr. Karls*, the plaintiff. A trade of *Karls's* eighty acres in Adams county for *Drake's* lot in Madison was proposed. *Drake* stated that he knew nothing of the land in Adams county and that it was impossible for him to leave his work to go to see it. *Karls* assured him that it was good land, well located, and worth $1,500. According to *Drake's* testimony *Karls* said: "It isn't necessary for you to do it [go and see the land], you can rely on what I have told you, that in the least it is well worth $1,500." The trade was finally consummated.

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This action was brought by *Karls* to recover, on the warranty in the deed by which *Drake* conveyed the Madison property to *Karls,* damages occasioned by outstanding incumbrances. *Drake* counterclaimed for damages, alleging that the land in Adams county was not as represented and, particularly, was not worth $1,500. The only issues tried were those arising upon the counterclaim.

The jury, by its special verdict, found (a) that *Karls* represented to *Drake* that the land in Adams county was well located, was good land, and that it was worth at least $1,500; (b) that under all the facts and circumstances *Drake* was justified in relying upon such representations in making the trade; (c) that the fair market value of the Adams county land at the time of making the trade was $400; and (d) that the fair market value of the Adams county land would have been $800 if it had been well located and good land, as represented.

In the final judgment the plaintiff recovered $1,231.50, against which was offset $400 plus $54.60 interest thereon from October 2, 1914, to the date of the verdict, and judgment was rendered in favor of the plaintiff and against the defendant for $776.90, being the difference between said sums. From this judgment defendant appealed.

For the appellant there was a brief by *Gilbert & Ela* of Madison, and oral argument by *Emerson Ela.*

For the respondent there was a brief by *Albert G. Michelson* and *Rufus B. Smith,* both of Madison, and oral argument by *Mr. Smith.*

OWEN, J. The defendant contends that he was entitled to judgment in the sum of $1,100, being the difference between the fair market value of the Adams county land as found by the jury and the value thereof as represented by the plaintiff. The exact question presented is whether the representation made by the plaintiff that the land was well worth $1,500 is to be deemed a representation of a fact or

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merely the expression of an opinion. The trial court treated it as the expression of an opinion, and denied judgment for the difference between the actual value and the value as so represented.

The question of whether a statement concerning the value of property made by vendor to vendee amounts to a representation of a fact or merely the expression of an opinion is ofttimes troublesome. This question was quite thoroughly treated by this court in *Miranovitz v. Gee,* 163 Wis. 246, 157 N. W. 790, and after a consideration of the many authorities bearing upon the subject it was there said:

"A study of the cases suggests the thought that, in the absence of an express intent to defraud, the determination of whether or not certain representations are statements of fact or of opinion depends upon whether or not the person to whom the representations are made may, under all the facts and circumstances of the case, including such person's capacity or want of capacity, rely upon them. Where the person to whom they are made may rely upon them they are held to be statements of fact; where the person to whom they are made may not rely upon them, without being guilty of a want of ordinary care and prudence, they are denominated opinions."

Differently stated, the question is whether the doctrine of *caveat emptor* applied. If it did, the vendee had no right to rely upon the statements, and they constituted mere expressions of opinion. If, on the other hand, the circumstances did not hold the vendee to the doctrine of *caveat emptor,* then he was justified in relying upon the statements and they constituted representations of a fact.

No good purpose will be served by a re-examination of the many authorities bearing upon the subject. We are satisfied that the principle above quoted furnishes as correct, certain, and definite a test by which it may be judged whether a statement concerning values is to be regarded as a representation of a fact or the expression of an opinion as can be deduced. The rule is applicable to the facts of this case.

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This court has held that whenever there is any doubt as to whether a statement of this kind is the mere expression of an opinion or that of a fact, it must be determined by the jury or court. *Rogers v. Rosenfeld*, 158 Wis. 285, 149 N. W. 33. In this case the jury found that the defendant, under all the circumstances of the case, was justified in relying upon the representation of the plaintiff concerning the value of the land. Under the rule here approved this is equivalent to a finding by the jury that the statement made by the plaintiff concerning the value of the land was a representation of a fact. This being so, the defendant was entitled to judgment for the difference between the fair market value of the land which the jury found, $400, and $1,500, the value as represented by the plaintiff.

In limiting the amount of the judgment to the difference between the market value of the land as it was and the market value thereof if it had been good land and well located, the trial court thought that the situation was governed by the case of *Horton v. Lee*, 106 Wis. 439, 82 N. W. 360. In that case it was said:

"While the rule is well established that misrepresentations of the value of property in the circumstances indicated, however false and whatever be the intent of the vendor in making them, if there be no other wrongful element in the transaction consummated thereby, to the damage of the vendee, do not constitute actionable fraud, yet, if the vendee, to the knowledge of the vendor, is unacquainted with the subject of the sale and it is located in a distant section of the country, and by some artifice or trick on the part of the vendor the vendee is induced to purchase the property relying solely on the truth of the vendor's statement and the representations of others, acting in his interests and by his procurement, in regard to the value of the property, and such representations are false and result in damage to the vendee, the vendor is guilty of actionable fraud."

This language persuaded the trial court "that misrepresentations as to value do not constitute actionable fraud unless the vendor practices some artifice or trick by which the

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vendee is induced to purchase the property, relying solely on the truth of such representations."

The language above quoted from *Horton v. Lee* was applicable to the facts of that case. There artifice and fraud was practiced on the vendee for the purpose of dissuading him from examining the land. That was the particular circumstance in that case which took it out of the rule that a statement concerning value is generally to be regarded as the expression of an opinion. It was not intended to lay down a general rule to the effect that all statements concerning value are to be regarded as the expressions of an opinion unless accompanied by some artifice, fraud, or trick by which the vendee is induced to rely thereon. That is clearly indicated by the following statement which also occurs in the opinion:

"The rule as to representations of value applies strictly only where the parties are dealing at arm's length and on equal terms. It does not apply where the relations between them are of a fiduciary character or of trust and confidence, or the person to whom the representations are made is incompetent to do business or knows personally nothing about the subject of the sale and is purposely induced, by the conduct of the vendor, not to inform himself but to act under the advice of such vendor and the influences by him used to that end."

This rather general statement is entirely inconsistent with the idea that a statement concerning value is to be regarded as the representation of a fact only where the vendee is induced by artifice, trick, or fraud to rely thereon. It is more consistent with the rule laid down in *Miranovitz v. Gee*, 163 Wis. 246, 157 N. W. 790. The opinion in *Horton v. Lee* went no further than, first, to recognize the rule that representations concerning value are generally regarded as expressions of opinion; and second, that the circumstances there proved took the case out of that rule, and constituted statements there made representations of a fact. It was not intended to hold, and the court did not hold, that under no

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other circumstances could such statements constitute representations of a fact.

As set forth in the statement of facts, the plaintiff recovered $1,231.50 on his claim. Defendant recovered $400 with interest thereon from October 2, 1914, to the date of the verdict, or $454.60 in all. He should have recovered $1,100 with interest for the same period, or a total of $1,250.15. The defendant, therefore, was entitled to judgment as of the date of the verdict in the sum of $18.65, with costs.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment in favor of the defendant in the sum of $18.65, with costs, as of the date of the judgment.

F. EGGERS VENEER SEATING COMPANY and another, Appellants, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

December 3, 1918—January 7, 1919.

Workmen's compensation: Rupture: Right to compensation: Evidence: Competency: Employer's report of accident: Formal offer in evidence not necessary: Testimony of physician: Proximate cause of injury.

1. Where an employee, in the performance of his duties, sustained a rupture of the small intestine which was caused by the fall of an elevator and resulted in his death on the next day, the fact that he would not have been hurt very badly if he had not been ruptured before the accident or if he had not been wearing an improperly fitting truss did not affect the right to compensation under the statute.
2. A report of the accident filed by the employer with the industrial commission, stating that the operator of the elevator lost control of it and it fell and that the deceased was in the car and was injured, was competent evidence at the hearing before the commission, even though not formally offered in evidence, and established a *prima facie* case.
3. The testimony of a physician that, when called to attend the employee within an hour after the accident, the injured man

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told him that the drop of the elevator hurt him, and that when he examined the injured intestine and the imperfect truss he concluded that the shock caused by the drop of the car was the primary cause of the injury, was competent and was sufficient to warrant a conclusion that the injury was proximately caused by the accident.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action was brought by the plaintiffs to set aside an award of the *Industrial Commission* by which *Hermeline Lesperance* was awarded $2,016 as compensation for the death of her husband from injuries which it is alleged he suffered while in plaintiff's employ and which arose out of and were incident to his employment.

It is claimed that John Lesperance, a man seventy-two years of age, who had been suffering from rupture for seven years, was injured when an elevator belonging to the plaintiffs dropped some distance, producing a rupture of the small intestine which resulted in his death on the following day. The plaintiffs claim that the evidence shows that the elevator did not drop, as is alleged by the defendants, and that Lesperance had been wearing an improperly fitting truss, which was the proximate cause of the ruptured intestine.

The *Industrial Commission* found that John Lesperance, while performing service growing out of and incidental to his employment, accidentally sustained the alleged personal injuries which resulted in his death, and awarded to the widow, *Hermeline Lesperance,* the sum of $2,016.

The circuit court found that the *Commission's* award is sustained by evidence to the effect that the elevator on which decedent was riding did not operate properly, and held that "The fact that the decedent would not have been hurt very badly if he had not been ruptured before the accident or if he had had a properly fitting truss does not change the situation. Neither negligence in wearing an improperly fitting truss or predisposition to injury affect the right to claim compensation under the workmen's compensation act."

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Judgment was entered sustaining the award of the *Industrial Commission,* from which judgment the plaintiffs appeal.

For the appellants there were briefs by *Otjen & Otjen* of Milwaukee, and oral argument by *Henry H. Otjen.*

For the respondents there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, attorneys for the *Industrial Commission,* and *F. W. Dicke* of Two Rivers, attorney for *Hermeline Lesperance;* and the cause was argued orally by *Mr. Gilman* and *Mr. Dicke.*

SIEBECKER, J. The appellants insist that the evidence does not support an award, for the reason that the alleged falling of the elevator was not the proximate cause of Lesperance's death. The claim is made that it conclusively appears that his death was solely caused by the defective truss he wore at the time he was riding in the elevator, and hence his injury is not attributable to the fall of the elevator and it cannot be said to be the natural consequence thereof. This position of appellants is based on the ground that the statements of Dr. Gates of what Lesperance told him concerning the history of his ailment and the relation of the accident to his injury, and the admission of the employer in its report of the accident to the *Industrial Commission,* are not competent as evidence to sustain an award. The employer made and filed a report of the accident pursuant to the Rules of Practice of the *Industrial Commission* (Rule 2), stating that the elevator operator lost control of the car and that it dropped to the bottom; that Lesperance was in the car and was injured. The contents of this report are competent and establish a *prima facie* case. *First Nat. Bank v. Industrial Comm.* 161 Wis. 526, 154 N. W. 847. The provision of sec. 2394—16, Stats., clearly contemplates that the *Commission* may cause the facts pertaining to industrial accidents to be ascertained by them in this manner and may be considered by them on final hearing. The evidence of the at-

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tending doctor is, in substance, that the deceased informed him, when he was called to his attendance within about an hour after the alleged accident, that the drop of the elevator hurt him, and that when he examined the injured intestine and the imperfect truss he concluded that the shock caused by the drop of the elevator was the primary cause of the injury to the intestine. This evidence is of such substantial character that a reasonable conclusion can be drawn therefrom that the injury was proximately caused by the accident. Such evidence was held to be proper proof on the subject in *Wright v. Kerrigan,* [1911] 2 Irish Rep. 301; *First Nat. Bank v. Industrial Comm., supra.* The objection that the employer's report of the accident was not formally offered in evidence is not well taken. The employer was fully aware of the contents of this report. If any corrections thereof were deemed necessary they should have been brought to the attention of the commissioners upon the hearing. The proceedings before the *Commission* are not to be hampered by useless formalities nor technicalities. *Anderson v. Miller S. I. Co.* 169 Wis. ——, 170 N. W. 275; *Carroll's Case,* 225 Mass. 203, 114 N. E. 285; 1 Bul. Illinois Ind. Board, 178; *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209.

The record clearly sustains the circuit court in holding that the award is sustained by the evidence.

By the Court.—The judgment is affirmed.

OWEN, J., took no part.

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HOLT LUMBER COMPANY and another, Respondents, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Appellants.

December 3, 1918—January 7, 1919.

Workmen's compensation: Employee required to sleep on premises: Performing service growing out of and incidental to his employment.

1. When the contract of employment contemplates that the employee shall sleep upon the premises of the employer, the employee is considered to be performing service growing out of and incidental to such employment during the time he is on said premises.
2. Thus, where a person continuously employed in the woods by a lumber company, under its care and protection at night as well as during the day, and required to sleep in its camp, was injured while in his bunk in the evening by a straw falling from the bunk above and lodging in his throat, he was at the time performing service growing out of and incidental to his employment, within the meaning of sub. (2), sec. 2394—3, Stats.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The appeal is from a judgment setting aside an order of the *Industrial Commission* awarding to appellant *Sam Bebeau* $259.03 as compensation and expenses.

Appellant *Sam Bebeau* was in the employ of the *Holt Lumber Company* as a sawyer at one of its camps. On the evening of March 13, 1917, while in his bunk talking to a fellow employee who was in an adjoining bunk, a straw fell from the bunk above, lodged in his throat, causing infection, which resulted in disability for which compensation was awarded.

The lower court set aside the award on the ground that the evidence was not sufficient to support the finding to the effect that at the time of the accident appellant was performing services growing out of and incidental to his employment.

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For the appellant *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondents there was a brief by *Otjen & Otjen* of Milwaukee, and oral argument by *Henry H. Otjen.*

KERWIN, J. The *Industrial Commission* as a basis for awarding damages to appellant *Sam Bebeau* found, among other things, that

"During the winter of 1917 the applicant was in the respondent's employ in the woods as a sawyer; he was paid $40 per month and board and lived in a camp furnished by the respondent; this camp was located several miles from any other dwelling, and all of the men employed by the respondent at this particular logging operation boarded at the respondent's camp; the men in the camp slept in bunks arranged so that one man slept above the other.

"On the evening of March 13th, after his supper, the applicant retired to his bunk, and while talking to a fellow workman in the bunk next to him a piece of straw dropped from the bunk above his and lodged in his throat; he made an effort to remove the straw, called the attention of the man in the adjoining bunk to his condition, but was unable to dislodge the straw. . . .

" . . . The facts in the case show that the employees of the respondent in this particular camp were in the employ of the respondent from the time they entered the camp until they left. They could not select their own sleeping quarters, but were compelled to sleep where the respondent instructed them to sleep. In fact there was no other place for them to sleep. The evidence shows that in order to sleep outside the camp a man would be required to travel eight miles. We think that where the employer places the workman in such circumstances that his time is never his own, where he has no discretion as to where he shall sleep and where he shall eat, that the workman must be considered in the employ of the respondent all of the time, or at least performing a service which is incidental to the employment he is engaged in. We think that the facts in this case show that this man was accidentally injured while in the respondent's

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employ, and that he is entitled to the benefits of the compensation act."

The findings of the *Commission* are supported by the evidence.

It is established by the evidence that *Bebeau* was in the continuous employ of the *Holt Lumber Company* during the logging season, and under its care and protection as well during the night when off duty as during the day; it furnished the bunks where he and other men slept; the bedding furnished was very old and in poor condition, the straw sticking through the ticks; there were two men in the bunk above that in which *Bebeau* slept; the men were expected to perform some service after supper, such as grinding axes.

The only question involved is whether the court below erred in holding that the appellant *Bebeau* was not at the time of the accident performing services growing out of and incidental to his employment within the meaning of sub. (2), sec. 2394—3, Stats.

This court has held, in harmony with the decisions of other courts, that the provisions of the compensation act should be liberally construed. *Sadowski v. Thomas F. Co.* 157 Wis. 443, 146 N. W. 770; *Kiel v. Industrial Comm.* 163 Wis. 441, 158 N. W. 68; *Federal R. M. Co. v. Havolic,* 162 Wis. 341, 156 N. W. 143; *In re Ayers* (Ind. App.) 118 N. E. 386.

The court below held that *Bebeau* was not performing services growing out of and incidental to his employment and based its ruling upon the following cases in this court: *Hackley-Phelps-Bonnell Co. v. Industrial Comm.* 165 Wis. 586, 162 N. W. 921; *Brienen v. Wis. P. S. Co.* 166 Wis. 24, 163 N. W. 182; *Federal R. M. Co. v. Havolic, supra.* These cases are all distinguishable from the case at bar. In the *Hackley-Phelps-Bonnell Case* the man had fully completed his work and left the employment. In the *Brienen Case* the injured person was performing a private service for himself, which had no connection with the business of his employer.

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Federal R. M. Co. v. Havolic, supra, as distinguished in *Newport H. C. Co. v. Industrial Comm.* 167 Wis. 630, 167 N. W. 749, is not authority against the appellants here.

In the instant case, at the time of the injury *Bebeau* was in the employ of the lumber company, under its protection, and using the things which it furnished to him for his use during the employment and as incident to such employment. Under such circumstances he was performing services growing out of and incidental to his employment within the meaning of sub. (2), sec. 2394—3, Stats. *Ewald v. C. & N. W. R. Co.* 70 Wis. 420, 36 N. W. 12, 591.

This court has held that the relation of master and servant extends beyond the hours the servant is actually required to labor and in some instances to places other than the premises where the servant is employed. *Milwaukee v. Althoff,* 156 Wis. 68, 145 N. W. 238; *Northwestern I. Co. v. Industrial Comm.* 160 Wis. 633, 152 N. W. 416.

It has also been held by this court that one eating lunch upon the premises of his employer in accordance with custom is performing services growing out of and incidental to his employment. *Racine R. Co. v. Industrial Comm.* 165 Wis. 600, 162 N. W. 664; *Milwaukee W. F. Co. v. Industrial Comm.* 159 Wis. 635, 150 N. W. 998.

The same ruling has been made in other jurisdictions. *Rowland v. Wright,* 1 Butterworth's Workm. C. C. 192; *Heldmaier v. Cobbs,* 96 Ill. App. 315; *Taylor v. George W. Bush & Sons Co.* 5 Penn. (Del.) 378, 61 Atl. 236.

In the instant case it was part of the contract of employment that *Bebeau* should sleep on the premises in the bunk furnished by the lumber company. It was in the course of his employment to remain upon the premises nights and use the bunk furnished for him. Under such circumstances he was within the course of his employment. *Foley v. Home R. Co.* 89 N. J. Law, 474, 99 Atl. 624; *Richards v. Indianapolis A. Co.* (Conn.) 102 Atl. 604; *Hackley-Phelps-Bon-*

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ncll Co. v. Industrial Comm. 165 Wis. 586, 162 N. W. 921; *Kilduff v. Boston E. Co.* 195 Mass. 307, 81 N. E. 191.

The general rule under the authorities is that, when the contract of employment contemplates that the employee shall sleep upon the premises of the employer, the employee under such circumstances is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer. *Rucker v. Read,* 39 N. J. L. J. 48; *Chitty v. Nelson,* 2 Butterworth's Workm. C. C. 496; *Alderidge v. Merry,* 6 Butterworth's Workm. C. C. 450; *Griffith v. Cole Bros.* (Iowa) 165 N. W. 577; *Meyers v. Mich. Cent. R. Co.* (Mich.) 165 N. W. 703; *Cokolon v. Ship Kentra,* 5 Butterworth's Workm. C. C. 658; *International & G. N. R. Co. v. Ryan,* 82 Tex. 565, 18 S. W. 219.

A great many cases in point are cited in the able brief of the attorney general, but we shall not prolong this opinion by further citation of authority. It is sufficient to say that the great weight of authority supports the position of the attorney general to the effect that at the time of the accident *Bebeau* was performing services growing out of and incidental to his employment within the meaning of the workmen's compensation act, therefore the judgment of the court below must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded with instructions to affirm the award of the *Industrial Commission,* with costs.

OWEN, J., took no part.

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VILLAGE OF OSCEOLA, Respondent, vs. BEYL, Appellant.

December 4, 1918—January 7, 1919.

Municipal corporations: Ordinances: Judicial notice: Proof of publication: Presumptions.

1. Courts of this state will not take judicial notice of acts and ordinances of municipalities except upon due proof thereof; and where publication is required proof of publication must be made.
2. Where, however, a village ordinance, proved to have been regularly passed and recorded, has been in force for thirty-one years, the courts should, in the administration of the law, in the absence of any showing to the contrary, presume that the clerk performed his duty and that the ordinance was published in the manner prescribed by law (sec. 891, R. S. 1878).

APPEAL from a judgment of the circuit court for Polk county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the briefs of *C. C. & A. E. Coe* of Barron, and for the respondent on that of *Kennedy & Yates* of Amery.

ROSENBERRY, J. Under an ordinance of the village of *Osceola* the defendant was convicted of being drunk and disorderly, and the sole question raised on this appeal is whether or not the publication of the ordinance was sufficiently proved upon the trial.

At the time of the passage of the ordinance in September, 1886, it was provided by sec. 891, R. S. 1878, as follows:

"All ordinances and by-laws shall be signed by the president and countersigned by the clerk; and if any penalty or forfeiture is thereby, in any event, imposed, shall, before taking effect, be published one week, at least, in some newspaper printed in the village and if there be no newspaper, copies thereof shall be posted in at least three public places therein, one week before the same shall take effect. Proof of such publication by the affidavit of the printer or foreman

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in the office of such newspaper, or of such posting, by the certificate of the village clerk, shall be attached to and filed with such ordinance or by-law, and noted on the record thereof, and shall be conclusive evidence of the facts stated. . . ."

By sec. 880, R. S. 1878, it was made the duty of the village clerk—

"3. To attend all meetings of the village board; to record and sign the proceedings thereof, and all ordinances, rules, by-laws, resolutions and regulations adopted, and to countersign and keep a record of all licenses, commissions and permits granted or authorized by them, and for such purposes to keep the following books: . . .

"An ordinance book in which shall be recorded at length in chronological order, all ordinances, rules, regulations and by-laws. . . .

"4. To countersign and cause to be published or posted every ordinance, by-law, or resolution, as required by law, and to have proper proof thereof made and filed."

There was in the office of the village clerk at the time of the trial an ordinance book in which were contained the several ordinances of the village arranged in chronological order, and upon the trial such book was offered in evidence to prove the passage and publication of ordinance No. XIV, which is as follows:

"Ordinance No. XIV.

"An ordinance relating to drunkenness.

"*The village board of Osceola do ordain as follows:*

"Section 1. Any person who shall be found in a state of open or notorious drunkenness or intoxication, within the limits of the village of *Osceola,* to the annoyance or disturbance of any of the citizens or other person or persons, in said village, shall on conviction thereof before the police justice of said village, be punished by a fine not exceeding fifty dollars and costs; and in default of the payment of such fine and costs be imprisoned in the county jail not exceeding thirty days. HENRY B. DIKE, President.

"Passed September 9, 1886.

"Attest: Stephen Rowcliff, Clerk."

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It not appearing by notation or otherwise in the ordinance book that ordinance No. XIV had been published as required by law, and it appearing that there was a newspaper published within the limits of said village, the defendant objected to the reception of the book in evidence for that reason. The defendant's objection was overruled and the book admitted. At the close of the trial there was offered and received in evidence, against objection by defendant, a small book containing twenty-four sheets of paper 7 x 8 inches, stitched in the back, with a light board cover, of the kind ordinarily designated as a composition book. On the outside of the cover was written the word "Ordinances." Beginning with the first sheet there was pasted to it a newspaper clipping designated Ordinance No. I, with the certificate of the clerk. On the second sheet likewise appeared Ordinance No. XIII. On the third sheet likewise appeared Ordinance No. XV, and on the fourth sheet appeared Ordinance XIV, which is a copy of the ordinance in question in this case. At the foot of each of the ordinances appeared the following certificate:

"County of Polk, }
"Village of *Osceola.* } ss.

"I, Stephen Rowcliff, village clerk of said village, do hereby certify that I have carefully compared the above and foregoing ordinance with the original thereof on file in my office, and that the same is a true and correct copy thereof and of the whole thereof. STEPHEN ROWCLIFF,
"September 25, 1886. Village Clerk."

This book, which contained one other ordinance, in no respect complied with the provisions of sec. 4137, Stats., and was inadmissible for any purpose, it being merely a fugitive book, one not required by law to be kept and one not kept in the manner which the law prescribed. The courts of this state will not take judicial notice of acts and ordinances of municipalities except upon due proof thereof, and where publication is required proof of publication must be made.

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Stittgen v. Rundle, 99 Wis. 78, 80, 74 N. W. 536; *Pettit v. May,* 34 Wis. 666. Under the provisions of sec. 891, R. S. 1878 (sec. 892, Stats. 1917), the ordinance did not go into effect until published.

The record in this case is very meager, but it may be said that it fairly appears that the ordinance in question had been in force in the village of *Osceola* for more than thirty-one years at the time of the trial. The question then arises whether or not, in the absence of the notation of the fact of publication which the law requires the clerk to make, it may be presumed that the ordinance was published. We have come to the conclusion that where an ordinance of a village has been in force for thirty-one years, it being proved that the ordinance was regularly passed and recorded, the courts should, in the administration of the law, in the absence of any showing to the contrary, presume that the clerk had performed his duty and that such ordinance had been published in the manner prescribed by law. Without approving all that is said in the opinions therein, we cite in this connection the following cases: *Santa Rosa City R. Co. v. Cent. St. R. Co.* 4 Cal. Unrep. 950, 38 Pac. 986; *Quincy v. C., B. & Q. R. Co.* 92 Ill. 21; *Atchison v. King,* 9 Kan. 550; *Muir's Adm'rs v. Bardstown,* 120 Ky. 739, 87 S. W. 1096; *Depue v. Banschbach,* 273 Ill. 574, 113 N. E. 156; *Barber A. P. Co. v. Jurgens,* 170 Cal. 273, 149 Pac. 560; 2 McQuillin, Mun. Corp. § 864.

The publication of the ordinance being presumed, the error in admitting the fugitive book was an immaterial one.

By the Court.—Judgment affirmed.

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HATHAWAY, Respondent, vs. BRUGGINK and others, Appellants.

December 5, 1918—January 7, 1919.

Libel: Absolute or qualified privilege? Examination of defendants by plaintiff before pleading: Sales of liquor to minors and on Sundays: Letter to attorney general charging neglect of duty by sheriff: Irrelevant matter: Malice: Questions for jury.

1. An absolutely privileged communication, not being a basis for an action of libel, does not give the plaintiff in such an action any right to an examination of the defendants before pleading, under sec. 4096, Stats.
2. Upon a motion in such case to restrain a proposed examination of defendants, the question whether the communication was absolutely privileged must be determined by what appears on its face, and anything extrinsic (such as an affidavit by a defendant stating facts and reasons why the communication was written) must be disregarded.
3. A letter to the attorney general stating the writers' belief that the excise laws of the state were being violated in their village by sales of liquor to minors and by the keeping of saloons open on Sundays with accompanying disorders; that no help could be had from the sheriff or the district attorney of the county; and that the writers wished to have something done by the attorney general and to "have the privilege of having peace" in the village, is *held* to be within the rule of qualified privilege, as being a communication calling to the attention of a public official, authorized to take action thereon, an alleged violation of the law.
4. Sales of liquor to minors in violation of sec. 1577, Stats., would be a breach of a saloonkeeper's bond, for which, under sec. 1549, an action might be brought in the name of the state; and under sec. 14.53 the attorney general is authorized and may be required to represent the state in such an action.
5. The language of the letter in question with reference to the saloons being "open" on Sundays is construed as charging that liquor was sold therein on Sundays. [Whether, in view of what was held in *State v. Wacker,* 71 Wis. 672, the attorney general might, under sec. 3180*a,* Stats., proceed to abate the saloons so violating the Sunday law as being public nuisances under sec. 1563, is not determined.]
6. The letter being only conditionally privileged, an action by the sheriff mentioned therein for libel might be based upon it if, as alleged, the statements therein as to him were made falsely

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and maliciously; and malice might be proved by showing that such statements were made recklessly or were based on nothing in the way of information.

7. It being stated in the letter that the sheriff will do nothing, "being up to his neck in booze most of the time himself," the question whether the words quoted constituted such an unnecessary, irrelevant, and gratuitous charge and insult as not to be within the protection of the rule of qualified privilege might, upon evidence being adduced, become a question for the jury.

8. The communication in this case not being absolutely privileged, and it appearing that in the action for libel based thereon there may be issues of fact to be determined by a jury, an examination of the defendants under sec. 4096, Stats., by the plaintiff before pleading, was permissible.

APPEAL from an order of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The appeal is from an order denying an application to restrain plaintiff from proceeding under sec. 4096, Stats., in a proposed examination of certain defendants before pleading.

The plaintiff commenced an action by summons and sought to examine the defendants *George R. Mayhew* and *Garret Bruggink* before pleading under the provisions of sec. 4096. Plaintiff's affidavit upon which such examination was proposed to be had alleged in substance:

That plaintiff, of good name, fame, and reputation, was at the time the sheriff of Dodge county; that the defendants maliciously composed and published of plaintiff and sent to the attorney general of Wisconsin the following letter:

"Burnett, Wis., May 4, 1918.

"Hon. Spencer Haven, State District Atty. General, Madison, Wis.

"My dear Mr. Haven:

"We have in this town two saloons. Neither one takes any consideration as to whether they are molesting the peace or not. Our state 'Blue Law' prohibits saloons being open on Sunday. We have them open every Sunday. Things go

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on altogether through the back door. The street entrance is closed on Sunday.

"We believe that 'booze' is being sold to 'minors,' and we also believe that it is being sold to our boys in 'khaki' by one of them at least.

"Complaint has been made to the sheriff, but he will do nothing. (Being up to his neck in 'booze' most of the time himself.)

"Waupun and Brandon are dry. On Sundays we are almost overrun with 'booze hoisters.' Some of the most disgraceful things are going on that one can imagine. The element here is altogether for 'booze,' and those who are taking this in with some degree of patience are getting tired of it.

"May 3, 1918, we, the undersigned, went to Beaver Dam, Wisconsin, to see our district attorney, Mr. M——, but we could get no satisfaction. He claimed that it has to be settled locally, and that he could do nothing for us. We, however, are convinced that he is a man who was put in office by the 'liquor element.' His work shows it. Complaints have been made by others in regard to his work in this district.

"We are advised by the Rev. T——, Milwaukee, Wisconsin, representing the Lord's Day Alliance, that we should see Mr. M——, and that if he did not want to take action to report the case to you. We are doing this, hoping that in some way or other you may be able to make him see things in a different light. He also advised us that you want every district attorney to do his duty.

"May we, the undersigned, have the pleasure of having something done here? May we have the privilege of having peace in Burnett? Sincerely yours,

"(Signed) GARRETT BRUGGINK.
"S. A. CLIFFORD.
"GEO. R. MAYHEW.
"GEO. W. SMITH.
"H. J. HASKINS."

The defendants moved the court below to restrain the plaintiff from so proceeding on the ground that certain of the seventeen points upon which plaintiff sought discovery were not relevant and other points related to matters that

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are privileged. With such motion was presented an affidavit of the defendant *Mayhew* containing allegations as to facts and reasons why such letter was written and sent. The court denied the defendants' motion, and from the order so denying and also fixing a time for such examination the defendants have appealed.

C. E. Hooker of Waupun, for the appellants.

For the respondent there was a brief by *Clark & Lueck* of Beaver Dam, and oral argument by *A. W. Lueck* and *Royal F. Clark.*

ESCHWEILER, J. The only proposition urged by defendants on this appeal is that the letter in question is within the class of absolutely privileged communications and for that reason cannot be made the basis of an action for libel. If it be such, then it necessarily follows that no right to the proposed examination of defendants under sec. 4096, Stats., could be predicated upon it under the unquestioned rule in this state. *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900.

Plaintiff insists that the communication in question neither charges the violation of any law nor does it ask for any specific relief, and that therefore it does not come either within the class of absolute or of qualified privilege, and that the expression in the letter referring to him as "(being up to his neck in booze most of the time himself)," which is relied upon as the basis for this libel action, is such a false, irrelevant, unfair, and contemptuous expression as to make it libelous no matter what view may be taken of the balance of the communication.

In the present disposition of this case the letter must be tested by what appears on the face of it, and anything extrinsic, such as is the defendants' affidavit, must at this time be disregarded.

We think that a reasonable and fair construction of this communication as it is written and in its entirety requires

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the conclusion that it is in substance a complaint to the attorney general of this state conveying to him the belief of the writers that the excise laws of this state were being violated in their home town; that no help in that regard could be had from the plaintiff as sheriff or from the district attorney of that county; and that the writers wish that something be done by the attorney general and that they may "have the privilege of having peace in Burnett."

The letter states the writers' belief that liquor is being sold in their village to minors. If such sales were being made they were in violation of sec. 1577, Stats. Such sales would be violations of the terms and conditions prescribed in the bond required of every licensed saloonkeeper by sec. 1549, Stats. Under this sec. 1549 an action may be brought against the principals and sureties in such bond for such breach. Such action could be brought in the name of the state of Wisconsin, and under sec. 14.53, Stats., the attorney general may be required to and is authorized to represent the state in actions in which it shall be a party.

The plaintiff also argues that the language in the first paragraph of the letter should be construed to mean nothing more than that the saloons therein referred to are open in the sense of permitting persons to enter therein on Sundays, rather than charging that there is a violation of sec. 1564, Stats., which prohibits the selling, giving away, or bartering of any intoxicating liquors on Sunday. A consideration of the entire language of the first paragraph of this letter would certainly give warrant to the person to whom the same was addressed to understand therefrom that there were sales being made in saloons on Sunday and that there was intended to be charged a violation of the law prohibiting the doing of business in the way of selling intoxicating liquors on Sunday, rather than the charge that the keepers of the saloons were going through the idle formality or empty courtesy of permitting persons to enter through the back

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door and then to wander about therein with unsatisfied thirst.

Whether, however, the attorney general might, as suggested by defendants, under the provisions of sec. 3180*a*, Stats., proceed to abate such saloons so violating the Sunday law as being such a public nuisance as is defined under sec. 1563, Stats., in view of what was held by this court in the case of *State v. Wacker*, 71 Wis. 672, 38 N. W. 189, it is not necessary to now determine and we therefore express no opinion upon that proposition.

The letter, therefore, being one that calls to the attention of a proper public official, who is authorized to take some action thereupon, an alleged violation of the law, it brings the entire communication within the rule of qualified privilege. The case here is controlled by the case of *Joseph v. Baars*, 142 Wis. 390, 125 N. W. 913. There a communication to a village marshal by the defendant, for the purpose of having criminal proceedings instituted against the plaintiff therein, was held to be a privileged communication if written in good faith, and that the defendant would be protected and held immune from an action for libel unless the plaintiff was able to prove that there was actual malice in the making of any false statements therein contained, and that such malice might be proven by evidence showing that such statements were made recklessly or based on nothing in the way of information.

The plaintiff in his affidavit has alleged that the communication was made with malice, and this the plaintiff may be required to prove upon the trial. *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403; Cooley, Torts, p. 236; *Miller v. Nuckolls*, 77 Ark. 64, 91 S. W. 759, 4 L. R. A. N. S. 149

The principle here involved and the situation are substantially different from any disclosed in the authorities relied upon by defendants in their argument on this appeal, that the communication is one entitled to the protection afforded by the rule of absolute privilege. In *Larkin v.*

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Noonan, 19 Wis. 82, relied upon, the communication was to the governor, who under the law had the power of removal of the sheriff concerning whom the communication was made, and because of such power of removal it was said that the action contemplated or requested by the communication, namely, the removal of the plaintiff sheriff by the governor, so partakes of the nature of judicial proceedings that it should come within the same rule of absolute protection as governs all testimony, statements, or communications in or with reference to strictly judicial proceedings. The same principle was recognized in the subsequent case of *Werner v. Ascher*, 86 Wis. 349, 56 N. W. 869. That the absolute privilege extends to statements both malicious as well as false is indicated in such cases as *Schultz v. Strauss*, 127 Wis. 325, 106 N. W. 1066; *Keeley v. G. N. R. Co.* 156 Wis. 181, 145 N. W. 664; *In re Quarles*, 158 U. S. 532, 15 Sup. Ct. 559; *Reycraft v. McDonald*, 194 Mich. 500, 160 N. W. 836; *Flynn v. Boglarsky*, 164 Mich. 513, 129 N. W. 674; *Connellee v. Blanton* (Tex. Civ. App.) 163 S. W. 404.

We cannot at this stage of the case hold that as matter of law the expression appearing in parentheses in the quoted letter above, that plaintiff himself "is in booze up to his neck," is such an unnecessary, irrelevant, and gratuitous charge and insult that it would be excluded from the protection of the rule of qualified privilege, as was held as to the expressions involved in such cases as *Putnam v. Browne*, 162 Wis. 524, 155 N. W. 910; *Arnold v. Ingram*, 151 Wis. 438, 138 N. W. 111. Under sec. 1553, Stats., the plaintiff as sheriff is required, upon knowing or being credibly informed that any offense has been committed relating to the excise laws, to make complaint against the offending person to a proper judicial officer, and for neglect or refusal so to do such officer shall be deemed guilty of a misdemeanor. Such being the case, it may be that the jury may find under evidence that may be placed before them that there was some reasonable connection between the idea intended to be con-

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veyed by the rather crude expression thus complained of and the failure, if any there were, of the sheriff to proceed against persons who were violating the excise law, and the question, therefore, as to whether or not such expression was gratuitous and irrelevant and therefore outside the privilege must be left for the determination of the jury.

It follows therefrom that the trial court was right in holding that there might be issues of fact to be determined by a jury in the case and therefore that the proposed examination was permissible.

By the Court.—Order affirmed.

BARTA, Respondent, vs. BLAHNIK, Appellant.

December 5, 1918—January 7, 1919.

Sales: Acceptance of engine: Retention after time allowed for trial: Inducement by seller.

Although at the time of the sale of a gasoline engine it was agreed that the buyer should have thirty days for trial thereof before he need accept it, his retention and use of the engine for a longer period did not constitute an acceptance if the seller urged and induced him to keep and use the engine as long as he did, representing that it would eventually prove satisfactory.

APPEAL from a judgment of the circuit court for Kewaunee county: HENRY GRAASS, Circuit Judge. *Reversed.*

This action was brought to recover the purchase price of a gasoline engine sold the defendant. The sale was accompanied by a warranty

"That with proper management it will work equal to any other first-class machines made for doing the same work, if not better. We allow the purchaser, if desired, to use the above named machine *one day* on trial, and in case anything proves defective due notice must be given us or our agent, and time allowed to send a person to put it in order. If after this it will not work, and the fault be in the machine,

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it will be taken back, or the defective part replaced, or the money or notes (whichever may be given) will be refunded. Further use will be considered an acceptance of the machine by the purchaser. It is also warranted to be well made of good material, and breakage occurring within one year from defective material will be replaced free of charge."

Plaintiff conceded on the trial that he agreed orally to allow the defendant thirty days' trial of the machine instead of one day as provided in the written guaranty. Defendant contended that it was orally agreed that he should have thirty, sixty, or ninety days, or as long as he liked, within which to try the machine. This contention was, however, negatived by the jury. Defendant set up in his answer as a further defense that the engine never worked satisfactorily; that he had trouble with it every time he undertook to run it; that he frequently expressed dissatisfaction with it and requested the plaintiff to take it away, but that he was induced to keep it as long as he did by the repeated representations of the plaintiff that the trouble arose simply because the machine was new, the parts were tight, that it would not operate well until used for some time, and he urged him not to return the engine but to keep it for further trial, assuring him that it would eventually prove satisfactory. In other words, he was induced to keep the engine beyond the time allowed for trial at the request of the plaintiff and by virtue of representations made by him that the engine would eventually prove satisfactory. There was considerable evidence in support of this defense.

The following special verdict was submitted to and found by the jury:

"(1) Did the plaintiff on August 29, 1916, sell and then deliver to the defendant one ten-horse-power Steiner portable engine and a grinder attachment at the agreed price of $447, payable December 1, 1916? *A.* (Parties agree court should answer.) Yes.

"(2) Was it agreed between the parties that the defendant was to have thirty days for the trial of the engine before defendant need accept the engine? *A.* Yes.

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"(3) If you answer the second question 'No,' then answer: Was it agreed between the parties that the defendant could have thirty, or sixty, or ninety days, or as long as he wanted, to try the engine and be satisfied before he need accept it? *A.* ——.

"(4) Did the engine fail to comply with the warranties which the plaintiff gave to the defendant at the time the defendant purchased the engine? *A.* Yes.

"(5) If you answer the third question 'Yes,' then answer: Did the defendant, at any time after the purchase and delivery of the engine on August 30, 1916, and before he returned it on December 16, 1916, accept the machine? *A.* ——."

From judgment entered thereon in favor of the plaintiff defendant appealed.

For the appellant there was a brief by *Bruemmer & Bruemmer* of Kewaunee, and oral argument by *O. H. Bruemmer.*

Joshua L. Johns of Richland Center, for the respondent.

OWEN, J. The defendant seasonably requested the court to submit the following questions to the jury: (1) Should you answer the second question "Yes," then answer: Did defendant offer to return said engine within thirty days? (2) And if you answer said question "Yes," then answer: Did the plaintiff induce the defendant to keep on trying said engine until it was returned? The court refused to submit these questions, and such refusal is assigned as error.

It will be noticed that no question was submitted to the jury intended to elicit its finding upon the question of whether the failure of the defendant to return the engine within the period allowed for trial thereof was due to the inducements and representations of the plaintiff that the engine would eventually prove satisfactory. This was a material part of the defense. An affirmative finding on that fact would probably have entitled the defendant to judgment. The trial court seemed to be of the opinion that this defense was substantially negatived by the jury when they

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found that it was agreed as a part of the contract of sale that the defendant was to have thirty days' trial of the machine. In this the court was in error. That question simply called for the jury's finding upon what occurred at the time the contract of sale was entered into and before the delivery of the engine. The defense relied upon, and which was not submitted to the jury, arose from occurrences and conversations between the parties after the engine was delivered, and, if true, excused the defendant from his failure to return the engine within the period of thirty days. It seems clear that the defendant was denied a finding of the jury upon this very substantial defense, for which reason there must be a new trial.

By the Court.—Judgment reversed, and cause remanded for a new trial.

PULP WOOD COMPANY, Appellant, vs. GREEN BAY PAPER & FIBER COMPANY, Respondent.

December 5, 1918—January 7, 1919.

Appeal: Law of the case: Interstate commerce: Restraint of trade: Monopolies: Federal statute construed: Destroying competition: Invalidity of contracts: Severability of claims.

1. The decision of this court on a former appeal, reversing an order sustaining a demurrer to the complaint, and the principles of law then laid down constitute, so far as they go, the law of the case upon a later appeal from the judgment rendered after a trial.
2. In interstate commerce the producer of a commodity is not only entitled, under sec. 1 of the federal anti-trust act (26 U. S. Stats. at Large, 209, ch. 647), to protection against combinations which unreasonably depress the price of his commodity, even though the general public may to some extent benefit by the depression, but is also entitled, under sec. 2 of the act, to protection against combinations which destroy or attempt to destroy the competitive market for his product and compel him to sell it, if at all, to a single concern at a price fixed by that concern, *i. e.* he is entitled to protection against monopoly.

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3. The "restraint of trade" mentioned in sec. 1 of said act means only unreasonable or undue restraint; but business or trade monopolies are still offensive to the common law, and under sec. 2 of the act, which makes it a misdemeanor for any person or combination of persons to monopolize or attempt to monopolize "any part" of the trade or commerce among the several states, no such monopoly established by private persons of their own motion can be deemed reasonable or lawful.
4. To bring such a monopoly within the condemnation of the statute it is not necessary to show that pecuniary loss has already resulted either to individuals or to the public; there may in fact have been a temporary benefit. It is sufficient to show that the former competitive market has been destroyed and that it rests within the power of the monopoly to raise or lower prices at will.
5. A combination between pulp-wood purchasing agencies and a large number of paper manufacturers, which attempted to and did establish a purchasing monopoly and fixed the prices in the spruce pulp-wood market of a large part of the upper peninsula of Michigan, destroying the former competitive market, is *held* to have been unlawful under sec. 2 of said anti-trust statute, even though such combination may have produced beneficial results in increasing and making more steady the supply of pulp wood, in preventing ruinous competition and ruthless sacrifice of natural resources, in enabling the paper makers to make larger contracts for pulp wood and extend their field of supply into Minnesota and Canada, in reducing operating expenses, in making the annual supply sufficient and dependable, and in facilitating the readjustment of freight rates.
6. All contracts which formed essential or convenient parts of the machinery of such combination must be held void. Thus, in an action by one of the purchasing agencies against a paper manufacturer for breach of certain provisions of contracts between them by which defendant was to pay, for spruce pulp wood delivered to it, its *pro rata* share of the cost thereof to plaintiff, including expense of operating and interest on the capital used, it is *held* that there can be no recovery for such breach. It being admitted that defendant has paid the reasonable value of the pulp wood delivered to it, the action cannot be considered as one brought to recover the value of goods sold.
7. Claims, embraced in such action, based on defendant's breach of provisions in said contracts relating to hemlock pulp wood cannot be severed from the other claims, although no effort is found to have been made by the combination to control the

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output of hemlock. The inclusion of hemlock pulp wood in its contracts being one of the means found necessary or convenient to accomplish the illegal purpose of the combination, the contracts are void in that respect also.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

This is the second appeal in this action, the first being from an order sustaining a demurrer to the complaint. 157 Wis. 604, 147 N. W. 1058. The case has been tried by the court and judgment rendered for the defendant dismissing the complaint on the ground that the contract (for breach of which this action is brought) is void because contrary to both the federal and state anti-trust statutes.

The contract sued on will be found printed in full in the report of the former appeal and need not be printed here. It will be sufficient now to say that by its terms the plaintiff, a corporation engaged in the business of purchasing pulp wood for others, contracted with the defendant, a paper manufacturing corporation at Green Bay, to use diligence to procure and furnish to the defendant 5,000 cords of spruce, 17,500 cords of hemlock, and 2,000 cords of balsam pulp wood during the year 1905, and the defendant agreed that it would accept and pay for the pulp wood delivered to it under the contract. It appears further by the recitations of the contract that the plaintiff had also contracted to purchase and deliver during the same year to various other paper-making concerns located in the Fox River Valley or its immediate vicinity specified amounts of pulp wood aggregating 116,950 cords, making a total, including that contracted for by the defendant, of 141,450 cords; and the agreement provides that the defendant will accept and pay for its *pro rata* share of all the pulp wood which the plaintiff company shall of necessity deliver in order to operate economically during the season, even though in excess of said 141,500 cords, and will also accept in discharge of the contract its *pro rata* share of the pulp wood which the plaint-

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iff is able to deliver during the season, even if the same is less than 141,500 cords. The agreement also provides that the defendant shall ultimately pay for the pulp wood delivered its *pro rata* share of the cost thereof, including all "expense of operating" and seven per cent. interest on the capital employed in the business, payments of a certain base or invoice price per cord being provided for as deliveries are made and a settlement to be had at the end of the season, when the excess or deficiency in the amount already paid as the invoice price is to be determined and made right by return of the overpayment, if any, to the defendant, or the further payment by the defendant of any amount necessary to make up its *pro rata* share of the total expense of operation and interest on the capital employed. The contract further provides that the defendant shall not purchase pulp wood of any other person during the year. The complaint showed that this contract was one of a series of annual contracts of similar content covering the years from 1904 to 1909, inclusive.

It was stipulated on the trial that the defendant had made the base or invoice payments stipulated for during the time covered by all of the contracts and that the aggregate of such payments was all that the total pulp wood actually delivered was reasonably worth on the market.

The action is brought to recover (1) the defendant's *pro rata* share of a large loss resulting from the failure of one Perry to carry out a contract made with the plaintiff in 1903 to cut and deliver spruce pulp wood, it being claimed that such loss was a legitimate part of the cost of producing the pulp wood, and (2) certain claims for damages on account of the refusal of defendant to accept delivery of pulp wood on the contracts; also claims for interest charges upon delayed payments for pulp wood and a claim to recover the difference between the base or invoice price of the wood delivered under the contract of April 14, 1908, and the defendant's *pro rata* share of the cost of getting out and delivering the season's wood.

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The action was referred to W. L. Evans to hear, try, and determine, and he made findings to the effect that the contracts in question were void because they constituted a part of a scheme or combination to destroy competition and acquire a monopoly in the purchase and sale of pulp wood in Northern Michigan and Wisconsin and also to control prices and unreasonably restrain trade in pulp wood, to the material injury of the public. He concluded that the contracts were void and offended against the federal and state anti-trust laws as well as against the common law. The findings of the referee were confirmed by the circuit court and judgment rendered for the defendant, from which judgment this appeal is taken.

For the appellant there were briefs by *Hooper & Hooper* of Oshkosh, and oral argument by *Moses Hooper*.

For the respondent there was a brief by *Martin, Martin & Martin* of Green Bay, and oral argument by *P. H. Martin*.

WINSLOW, C. J. The federal anti-trust act, known as the Sherman act (26 U. S. Stats. at Large, 209, ch. 647), and the Wisconsin statutes bearing on the subject (secs. 1791*j* and 1747*e*) are quoted at length in the opinion on the former appeal in the present case and it is not deemed necessary to repeat them here. Both condemn contracts or combinations in restraint of interstate trade or commerce as well as monopolization or attempts at monopolization of any part of such trade or commerce. These sections were quite fully discussed and construed by this court upon the former appeal, and the principles of law then laid down unquestionably constitute the law of the case so far as they go upon the present appeal. *Ellis v. N. P. R. Co.* 80 Wis. 459, 50 N. W. 397; *Legault v. Malacker,* 166 Wis. 58, 163 N. W. 476.

These principles may be briefly stated as follows: *First,* the contract in question involved interstate commerce, and hence the federal statute is the statute to be applied to the

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case, although little, if any, difference is to be observed in the result in the present case whether the state or the federal statutes, or both, apply; *second,* the words "restraint of trade" in the federal statute have the same meaning which they had at common law, namely, acts, contracts, agreements, or combinations which operate to the prejudice of the public interests by unduly restricting competition or by unduly obstructing the due course of trade; *third,* the contract here involved shows some restriction of competition, or some obstruction of trade, but does not show whether the same is undue or unreasonable, hence resort must be had to evidence outside of the contract to ascertain whether it offends the statute; *fourth,* there is nothing intrinsically unlawful in two or more persons appointing a common agent to purchase a commodity which they require or in giving such agent the exclusive right to do their buying; such an arrangement becomes unlawful only when it injures the public by unduly restricting competition or restraining trade; *fifth,* the pulp-wood producer is entitled to protection against combinations which unreasonably depress the price of his commodity, even though the general public may to some extent benefit by the depression.

To these propositions may be added another, which seems to follow necessarily, namely: If, under the provisions of the first section of the federal act, the pulp-wood producer is entitled to protection against combinations which unreasonably depress the price of his product, he must also, under the second section of the act, be entitled to protection against combinations which destroy or attempt to destroy the competitive market for his product and compel him to sell his product, if he sells it at all, to a single concern at a price fixed by that concern, for this is monopoly.

Starting with these fundamental propositions as a basis, it will be well to state here the additional facts which have been added to the case by the proofs.

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The complaint showed that the plaintiff had been made the exclusive purchasing agent of pulp wood for twelve paper mills in the Fox River Valley; that the agreement was that each mill should take its proportionate share of the pulp wood which the plaintiff was able to purchase economically during the season, and pay to plaintiff the cost of producing the same, with seven per cent. interest on the capital invested. The only substantial restriction on trade was the agreement by the mills that they would not purchase pulp wood of any other person during the existence of the contract.

The additional facts shown by the evidence will now be stated.

First. The plaintiff corporation was one of three pulp-wood supply agencies operating on the same plan (the names of the other two being the Wisconsin Pulp Wood Company and the Northern Paper Company, each acting as purchasing agent for a number of mills (aggregating twenty-five mills in all), and these three agencies during the years in question operated together in the pulp-wood territory in Northern Michigan and Wisconsin, amicably dividing the territory between themselves and by agreement fixing prices.

Second. These three corporations or purchasing agencies were each formed by stockholders in some or all of the paper companies which became their respective patrons and the directorates were to a large extent interlocking and worked in harmony. Their contracts with their patrons were all substantially alike and of the same character, so far as the aspects of this case are concerned, as the plaintiff's contracts with the defendant and its other patrons.

Third. The plaintiff's patrons were twelve mills in the Fox River Valley consuming by far the greater part of the pulp wood consumed in that valley, which is one of the principal pulp-manufacturing centers in the country. The Wisconsin Pulp Wood Company bought for ten mills, all or

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nearly all of which were located in the Wisconsin River Valley; the Northern Paper Company bought for five Wisconsin mills located in the Wisconsin River Valley.

Fourth. The referee states in an able and carefully written opinion:

"The evidence shows that the few scattering mills not in any of the three purchasing agencies, such as the mill at the Canadian Soo, at Escanaba, Rhinelander, and two or three others, were an almost negligible factor in the general pulpwood producing territory of Michigan and Wisconsin. Most of them were able to get their supply at their very doors and did not go into the general market, and those that did were not a very influential factor as compared to the twenty-five mills in the three agencies. So far as the competition of Eastern mills was concerned, Mr. Taylor [plaintiff's purchasing agent] testified that the Eastern people who operated in the West went only into the Duluth market and into Canada."

Fault was found with this statement by the plaintiff's counsel as not being supported by the evidence, but there was unquestionably sufficient evidence to the effect that, so far as spruce pulp wood was concerned, the three agencies gathered a very large percentage, probably approaching, if not exceeding, three fourths of the amount of spruce pulp wood produced in the entire district of Wisconsin, Northern Michigan, and Minnesota. Apparently the percentage must have been considerably greater in the principal spruce-wood district, namely, the district extending from Gladstone eastward to the Soo, for it appears that the mills in the Fox and Wisconsin River Valleys were the logical markets for this territory and that other mills found it difficult to compete with them on account of their geographical advantages of location. Mr. Taylor, the plaintiff's manager, gave as a guess that from two thirds to three fourths of all the pulp wood produced in the territory from which the Wisconsin, Minnesota, and Michigan mills drew their supply was bought by the three purchasing companies. The objection that this

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is a mere guess is not very persuasive; Mr. Taylor doubtless had a fairly accurate idea of the success of the efforts of the combination and would have made no "guess" unless he had solid foundation for it. Tables of statistics showing the total production of spruce in Wisconsin, Minnesota, and Michigan during several of the years in question were put in evidence. They are not at all convincing. Not only do they cover the spruce-producing territory of the entire three states, but the one chiefly relied on includes the production of spruce timber as well as distinctive pulp wood. Even at this, the percentage bought by the three agencies averaged about fifty per cent. for the years 1905, 1906, 1907, and 1909, while for 1908 it was eighty-five per cent.

On the whole, we see no reason to question the truth of the proposition that, so far as spruce pulp wood (the most valuable pulp wood) was concerned, the outside mills were an almost negligible factor in the pulp-wood territory of Michigan and Wisconsin, and that in the district eastward from Gladstone to the Soo this was specially true.

Fifth. In the fall of each year before the lumbering season began, and after the orders for the season had been received from the mills, the three agencies were in the habit of sending agents through the producing districts getting the ideas of producers, and then the executive committee of the three agencies would meet and, after considering the amount of wood required, the business situation, the labor market, and the reports of the agents, would fix the price which the three agencies would pay for pulp wood during the coming season. The price so fixed was made known to the pulp-wood producers and ruled through the following season, unless it was later found that the price was not high enough to produce the wood, in which case it was raised and all producers given the benefit of the raise. This rarely happened.

Sixth. After thus fixing the price the three companies would each enter into written contracts with individual producers, hundreds in number, for their respective outputs for

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the year. These contracts were substantially alike, and contained a provision that the purchaser would not sell pulp wood elsewhere until the contract had been fulfilled and *all* the pulp wood delivered and accepted.

Seventh. That part of Northern Michigan lying between Gladstone and the Soo was one of the principal spruce-producing territories in the region covered by the combine, and in this territory the plaintiff was given by its colleagues the exclusive right to purchase during all the years in question except one, when the privilege was given to the Wisconsin Pulp Wood Company. In this region the White Marble Lime Company, a corporation of Manistique, Michigan, was a large purchaser of forest products, and during the years in which this territory was awarded to the plaintiff it made contracts with the Lime Company to purchase of it all the spruce pulp wood purchased by it in said region, which contracts contained provisions that all spruce pulp wood purchased by the Lime Company should be sold to the plaintiff and that the plaintiff should not buy any such wood in the territory of any other person.

In the year in which the Wisconsin Pulp Wood Company operated in this district it had a similar contract with the White Marble Lime Company. The evidence amply sustains the conclusion that, in the district named, the result of the combination and the contracts with the White Marble Lime Company was that producers of pulp wood had no competitive market. They could sell to the White Marble Lime Company or they could keep their product. Practically they had no choice. This was the conclusion which the referee reached in these words: "It appears to me very evident that the contracts between plaintiff and defendant, viewed in the light of the actual operations under them, the objects sought, and the results accomplished, brought about a monopolistic control of the pulp-wood industry in that section of the northern peninsula of Michigan covered by the White Marble Lime Company contracts," and he adds: "The

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situation created in this territory was exactly what the plaintiff aimed to create universally but accomplished with varying degrees of success; in this territory the system had reached perfection."

Eighth. In Door county, Wisconsin, a contract similar to that made with the Lime Company in Michigan was made with one Le Mere, giving him exclusive rights in that county, and another instance appears of the making of such an arrangement at Crandon, Wisconsin, the reason given being that the plaintiff did not like to deal with small producers but rather with large and responsible companies.

Ninth. By the establishment of the three purchasing agencies operating at a considerable distance from the mills located in the Fox and Wisconsin River Valleys and by the consequent entire cessation of purchases by the individual mills from producers in their immediate vicinity, the demand for what may be called the home supply of pulp wood has been substantially lessened and the market largely destroyed, or, in other words, the home supply of pulp wood has been conserved.

Tenth. The supposed beneficial results of the combination have been to slightly raise and make more steady the supply of pulp wood, prevent ruinous competition and ruthless sacrifice of natural resources; also to enable the paper makers to make larger contracts for pulp wood and extend their field of supply into Minnesota and Canada, to reduce operating expenses, to make the annual supply sufficient and to be depended on, and to facilitate the readjustment of rates of freight.

The plaintiff's argument is substantially this: Even conceding that, by reason of the combination, the producers in the district east of Gladstone were deprived of a competitive market and compelled to sell their pulp wood to the White Marble Lime Company at a price fixed by the combination, still it does not appear that any producer has lost a penny or that the price of paper has been raised. On the contrary, it

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appears affirmatively that the effects of the combination have been beneficial to the public because beneficial to the paper mills in the respects last above stated; hence that the restraint on trade cannot be called undue or unreasonable.

The argument has been well and strongly made by counsel for appellant, and if the first section of the federal act stood alone, construed as it has been by the supreme court of the United States, it would not be entirely clear how it could be answered. But that section does not stand alone; it is supplemented by another section directed against another supposed evil. The first section condemns all combinations in restraint of trade, but the legislative branch of the government was not satisfied to stop here. By the second section they proceed further and condemn not merely combinations but persons who monopolize or *attempt* to monopolize "any part" of the trade or commerce among the several states. To say that this second section means the same thing as the first would be to accuse the federal legislature of piling up words to no purpose. Plainly it was intended to add additional territory to the field of unlawful business activity. Restraint of trade was one thing, and a monopoly, while of course necessarily including restraint, was another. There might be restraint without monopoly, but no monopoly without some restraint.

Now, while it is settled by judicial decisions that the "restraint of trade" named in the statutes does not mean every restraint however trifling, but only an unreasonable or undue restraint, we do not understand that it has yet been held, by the court of last resort at least, that there may be a reasonable monopoly established by private persons of their own motion and without authority of law. Monopolies in trade, whether of buying or selling, have been offensive to the common law ever since the time when English kings used them as a means of rewarding favorites or wringing money from a reluctant people. It has been truly said that "the struggle of the English people against monopolies

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forms one of the most interesting and instructive chapters in their history." *Slaughter-House Cases,* 16 Wall. (83 U. S.) 36, 105. The common law of England denounced them, but the struggle did not end until the passage of the statute of 21 James I., which declared them void.

The first English colonists came to this country in the midst of that struggle and brought with them their hatred of all forms of monopoly. In the case of *Richardson v. Buhl,* 77 Mich. 632, 43 N. W. 1102, Chief Justice SHERWOOD expresses the prevailing thought on the subject thus:

"Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under government control, in the interest of the public. Its tendency is, however, destructive of free institutions and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal constitution, and is not allowed to exist under express provision in several of our state constitutions."

It is not our purpose now to maintain that this indiscriminate condemnation of business monopolies is economically sound or always just. It may be well that the time is approaching, if not already here, when monopolies or business combinations controlling the market (subject, however, to efficient government control) will be found more desirable than unrestrained competition; but that is a question for the lawmaking power to decide, not for the courts. It is sufficient for our present purpose to know that business monopolies are still condemned by the common law and that the federal law in question was unquestionably passed to strongly entrench in the federal field of action this long-established common-law principle and make its application to interstate commerce certain and specific as well as to provide adequate penalties in case of its violation.

Viewing the statute with its historic background, it seems certain that the combination here in question falls within the condemnation of the second section if not of the first.

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It is not necessary to show that pecuniary loss has in fact already resulted either to individuals or to the public, in fact there may have been a temporary benefit; it is the fact that the power to fix the buying or selling price of a necessary commodity in a given district has passed into the hands of an individual or a combination of individuals and the former competitive market destroyed that makes the statute active. From that fact alone injury to the public is implied, or rather (under the philosophy of the common law) that *is* a public injury. The material fact is that it rests within the power of the monopoly to raise or lower prices at will, not that it has actually raised or lowered them. *Harding v. American G. Co.* 182 Ill. 551, 55 N. E. 577; 19 Ruling Case Law, p. 10, § 4, and cases cited; Id. p. 37, § 103; *People v. Milk Exchange,* 145 N. Y. 267, 39 N. E. 1062.

These considerations are decisive of the question before us and make it certain that under the facts found by the referee the combination not only attempted to establish a purchasing monopoly in the spruce pulp wood market of Northern Michigan between Gladstone and the Soo, but actually succeeded in accomplishing its purposes during the years in question. It follows that all agreements which formed an essential or convenient part of the machinery of the combination must be held void. The agreement on which this suit is brought is one of them. The provisions of that agreement for the breach of which this action is brought were plainly integral and necessary parts of the scheme of monopoly, without which it would fail. It is an admitted fact that the defendant has paid the reasonable market value of all wood actually delivered to it by the plaintiff under the contract, so this action is not in any true sense brought to recover the value of goods sold, but to recover damages for failure to perform certain provisions of the contract deemed essential to make the combination a success. It is plain that there can be no recovery for the breach of such provisions.

It is argued that the contract is severable in its nature;

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that no effort is found to have been made to control the output of hemlock, and that practically all of the items making up the second cause of action relate to hemlock, and that these items may and ought to be severed from the other claims and allowed. We find ourselves unable to agree to this reasoning. There was one combination, not two. The illegal purpose with which it was formed tainted all the means employed which it found necessary or convenient to accomplish that purpose. The inclusion of hemlock pulp wood within its contracts was one of them. We can make no severance.

By the Court.—Judgment affirmed.

KERWIN, J., took no part.

TOWN OF HUMBOLDT, Respondent, vs. SCHOEN, Appellant, and others, imp., Respondents.

December 6, 1918—January 7, 1919.

Towns: Drains: Unauthorised expenditures: Recovery from town officers: Ultra vires acts: Estoppel: Parties defendant: Joint wrongdoers: Contribution.

1. Where, because it was not a proceeding under ch. 54, Stats., a resolution adopted at a town meeting, purporting to establish a drainage system and authorize the town board to fix and lay out districts in the town, did not confer any lawful authority upon the town officers, town moneys expended by them in procuring a survey and laying out of a system of drainage ditches may be recovered in an action by the town against them.
2. The acts of the town officers having been *ultra vires*, the town is not estopped from recovering the moneys so unlawfully expended by them, either by the fact that the electors adopted said resolution, by their ratification and approval of the acts of the officers in relation thereto, or by their subsequent formal authorization of the expenditure of town funds to defray expenses incurred in carrying out the project.
3. The action to recover the moneys so unlawfully expended may be brought by the town against any one or more of the of-

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ficers who participated in the illegal act, and those sued have no right to have their joint wrongdoers made parties defendant. If any right to contribution arises in favor of those against whom a recovery is had, it must be pursued in a separate action.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

This action was brought by the town to recover the sum of $1,214, with interest and costs and disbursements, for sums alleged to have been illegally expended by the defendants as town officers.

The complaint alleges that *Louis Schoen, Eugene Panure,* and *John Pigeon* were supervisors of the town of *Humboldt* and that Fred Clabots and *Joseph Baumgart* were respectively clerk and treasurer; that at the annual meeting of the town held April 6, 1915, the following resolution was adopted by the electors of the town: "Motion made and seconded that the town of *Humboldt* be brought under and is hereby brought under the county and state drainage system, and be it further resolved, that the town board of supervisors of said town shall lay out the different districts and fix the number of districts in said town at their first meeting after this day;" that the town board, without lawful authority other than that mentioned in the resolution, made a contract with the Steller Engineering Company to survey and lay out a system of drainage ditches in the town, and thereafter town orders payable to the Steller Engineering Company and other persons so employed were issued to the amount of $1,214; that the orders were issued by direction of the defendant *Schoen* as being audited by the town board, and countersigned by the defendant Fred Clabots as town clerk, and were paid by *Joseph Baumgart* as town treasurer out of the funds of the town which had been raised for general town purposes and for highway purposes and in part by a special tax levied by the town board, all of the officers thus mentioned presumptively

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knowing that the funds in the town treasury could not lawfully be used for this purpose.

The answer of the defendant *Schoen* alleges that the various acts of the town board were performed by authority given them by the town meeting under the resolution and subsequent appropriation of money in part payment of the amount sued for; that the board acted in good faith; that the work of procuring the survey was a necessary preliminary to the establishment of a drainage system for the town; that the work covered a period of about one year, and that at all times the residents and taxpayers of the town knew of the work and acquiesced in it; that the acts of the town officers were fully approved at the town meeting held in April, 1916. The answer further alleged that the town contained a population of more than 500 and had one or more incorporated villages located therein and that the town board was therefore vested with authority, under sub. (13), sec. 776, Stats., to incur these town obligations under the resolution adopted at the town meeting held on April 6, 1915.

A joint answer, filed by the defendants *Panure, Pigeon,* Clabots, and *Baumgart,* alleges that the sum of $500 had been raised by the town for the purpose of meeting a part of the indebtedness mentioned in the complaint and that this special fund had been used by the defendant *Louis Schoen* towards paying the indebtedness; that by authority from the electors of the town the remainder of the money so used was paid by money borrowed by due authority of the electors of the town; that the defendants *Eugene Panure* and *John Pigeon* never authorized the payment of the money and had nothing to do with the payment thereof; that the defendants Fred Clabots and *Joseph Baumgart* performed the acts relative to the payment of the money in good faith, not knowing of any illegality and believing that they had full authority in the matter; that at the regular meeting subsequent to the payment of the money the clerk reported the

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matter concerning the payment of the money to the electors and that the electors acquiesced in the payments; that by reason of their silence and acquiescence the town and its electors are estopped from claiming any illegality of such payments and from recovering the same from the defendants.

The jury found by special verdict, among other facts, that *Louis Schoen* and Fred Clabots, as officers of the town, issued town orders in payment for the survey for drains to the amount of $1,214 and that the same were paid by the treasurer, *Joseph Baumgart;* that the town orders were signed by *Louis Schoen* and Fred Clabots before the tax for the payment of such orders had been voted by the electors of the town; that *Louis Schoen* and Fred Clabots issued and signed these orders before the town board had audited and authorized the issuance of them; that Fred Clabots issued and signed them knowing that no tax for their payment had been voted by the electors and knowing that the town board had not audited them; that *Joseph Baumgart,* the treasurer, paid the orders knowing that the electors had never voted a tax for the drainage fund and knowing that the town board had not audited the claims; that the town board placed $500 in the tax levy for the year 1915 which was purposely raised as a drainage fund; that the town electors at their annual meeting in 1916 voted a fund of $500 and authorized the borrowing of $200 as a fund to pay for such survey work.

A verdict was directed in favor of the defendants *Panure* and *Pigeon.* The court, upon motion after verdict, dismissed the action against the treasurer, *Fred Baumgart,* and judgment was entered against the defendants *Schoen* and Clabots for the amount demanded in the complaint, with interest and costs.

From this judgment appeal is taken.

For the appellant there was a brief by *Sheridan & Evans* of Green Bay, attorneys, and *Daniel W. Sullivan* of Milwaukee, of counsel, and oral argument by *Phil Sheridan.*

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For the respondent *Town of Humboldt* there was a brief by *M. E. Davis* and *Minahan & Minahan*, all of Green Bay, and oral argument by *Mr. Davis* and *Mr. Hugh A. Minahan*.

SIEBECKER, J. On the former appeal of the case to this court (165 Wis. 541, 163 N. W. 177) it was determined that the resolution adopted by the electors at the annual town meeting in April, 1915, was not a proceeding under ch. 54, Stats., relating to town drains; that the only authority conferred on the town to establish, maintain, and pay for a drainage system is that provided for in ch. 54, Stats., and that sec. 776 does not confer such authority nor authorize the expenditure of town money for a drainage system. The facts of the case as established at the trial sustain the complaint so far as the foregoing propositions are involved and that decision necessarily rules the case upon these points. It logically follows that the town officers had no authority to establish this town drainage system; that their acts in relation thereto were clearly *ultra vires* and afford no protection to them in an action by the town to recover the funds so unlawfully expended by them for this purpose. *Etsell v. Knight*, 117 Wis. 540, 94 N. W. 290; *Douglas Co. v. Sommer*, 120 Wis. 424, 98 N. W. 249; *Washburn v. Lee*, 128 Wis. 312, 107 N. W. 649; *Milwaukee v. Binner*, 158 Wis. 529, 149 N. W. 211; *Milwaukee v. Reiff*, 157 Wis. 226, 146 N. W. 1130.

It is urged that the court erred in holding that the plaintiff town is not estopped by the acts of the electors in authorizing by resolution the establishment of a town drainage system, by ratifying and approving the acts of the defendants as town officers in relation thereto, and by their formal authorization of the expenditure of town funds to defray expenses incurred in carrying out this project as directed by them. Nothing need be added to what has been said by this court on the subject that estoppel cannot apply to *ultra vires* acts of municipal officers. The cases above cited and *McGowan v. Paul*, 141 Wis. 388, 123 N. W. 253; *Menasha W. W. Co.*

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v. Winter, 159 Wis. 437, 150 N. W. 526, fully establish this rule.

"It is one thing to apply the doctrine to the irregular use of a power that exists, and quite another thing to create a forbidden power by a forbidden act. The former is nothing more than a waiver of the regularity of the exercise of a power which the municipality may exercise—a valid ratification of an irregular act because there was the power to exercise it regularly. The latter would be the creation by an unlawful act of a power expressly withheld." *Menasha W. W. Co. v. Winter, supra,* p. 448.

The circuit court properly held that the town is not estopped from proceeding against the town officers to recover the town money which the officers caused to be paid out without any authority in the law. The resolution adopted by the electors April 6, 1915, obviously did not direct the town board to exercise the powers conferred on towns by sub. (13), sec. 776, and therefore the court did not err in rejecting evidence bearing thereon. The undisputed facts show that the town funds were illegally disbursed by town officers, and that the town has a cause of action against all or any of them who participated in this illegal act. Since the cause of action is based on such wrongful act, the town can sue to recover the amount thereof from any one or more of them, as it may deem best, and those sued have no right to have their joint wrongdoers made parties defendant to the action, nor have the defendants against whom judgment is awarded for recovery of these moneys the legal right to have the other town officers who acted with them made defendants for the purpose of enforcing whatever rights they may have, if any, for contribution from them if they pay the amount recovered against them. The plaintiff is not to be subjected to having such rights between defendants tried out in its action. This record clearly shows that no such questions were attempted to be litigated, and hence the court did not commit prejudicial error in dismissing the case as to *Baumgart,* the town treasurer, to which the plaintiff makes

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no objection. If any right of contribution arises in favor of appellant *Schoen,* upon payment of the judgment, he must pursue this right in a separate action against the other wrongdoers. *Bakula v. Schwab,* 167 Wis. 546, 168 N. W. 378.

By the Court.—The judgment appealed from is affirmed.

HOOYMAN, Respondent, vs. REEVE, Appellant.

December 6, 1918—January 7, 1919.

Physicians and surgeons: Malpractice: Injury to employee: Settlement with employer: When covers enhanced injury from physician's treatment.

1. A release, executed and delivered to the employer by an injured employee in consideration of the payment of a certain sum, acknowledging full satisfaction "of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from" the accident in question, covered and included a claim for injurious results alleged to have been caused by malpractice of a physician who was employed at the time of the injury to treat said employee.

[2. Whether in such case the employer and the physician were joint tortfeasors, as that term is ordinarily understood in tort cases, is not decided.]

3. Enhanced injuries resulting from the negligence or mistaken treatment of a physician employed, in the exercise of ordinary care, to treat an injured person, are generally to be regarded as direct results of the original injury.

APPEAL from an order of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Reversed.*

The appeal is from an order sustaining the demurrer to the following portions of the appellant's answer:

"Further answering, and as and for a second and separate defense, this defendant alleges upon information and belief that said plaintiff was injured on or about the 19th day of June, 1912, at Appleton, Wisconsin, while in the employ of the Appleton Coated Paper Company, of said place, and defendant further alleges that he, as a physician and surgeon,

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was employed to treat the injury so received by said plaintiff; and further answering, defendant alleges that after the happening of the accident and injury to said plaintiff on or about the 19th day of June, 1912, and before the commencement of this action, to wit, on the 25th day of September, 1913, the plaintiff, in consideration of the sum of three thousand dollars ($3,000) paid by the said Appleton Coated Paper Company, executed and delivered to the said Appleton Coated Paper Company a release, a copy of which is hereto attached marked 'Exhibit A,' and made a part hereof with the same force and effect as though set out at length herein; that by reason thereof and by reason of the execution and delivery of said release, said plaintiff has accepted compensation in full for the injury so received by him and has received full satisfaction for the injury so received, and said plaintiff has thereby released this answering defendant from any and all liability, and that the claim of plaintiff, if any, against the defendant has thereby been fully satisfied and discharged.

"Further answering, and as and for an offset and partial defense and in mitigation of plaintiff's alleged claim for damages, this defendant alleges upon information and belief that said plaintiff was injured on or about the 19th day of June, 1912, at Appleton, Wisconsin, while in the employ of the Appleton Coated Paper Company, of said place, and defendant further alleges that he, as a physician and surgeon, was employed to treat the injury so received by said plaintiff; and further answering, defendant alleges that after the happening of the accident and injury to said plaintiff on or about the 19th day of June, 1912, and before the commencement of this action, to wit, on the 25th day of September, 1913, the plaintiff, in consideration of the sum of three thousand dollars ($3,000) paid by the said Appleton Coated Paper Company, executed and delivered to the said Appleton Coated Paper Company a release, a copy of which is hereto attached marked 'Exhibit A,' and made a part hereof with the same force and effect as though set out at length herein."

The plaintiff demurred to each of the foregoing portions of the answer on the ground that the same did not state facts sufficient to constitute a defense.

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The release executed and delivered to the Appleton Coated Paper Company by the respondent is as follows:

For the sole consideration of the sum of three thousand and no 100 dollars, this 25th day of September, 1913, received from Appleton Coated Paper Co., I do hereby acknowledge full satisfaction and discharge of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 19th day of June, 1912, while in the employment of the above.

$3,000	REINHARD HOOYMAN. (Seal.)
Settlement.	Witness, Herman Hagen,
F. J. Rooney,	Address, Black Creek.
F. W. Grogan,	Witness, Nicholas Hermann, Jr.
Att'ys for Plaintiff.	Address, 915 College Ave., Appleton.

The claim of the respondent as set out in the complaint is that the appellant is liable for damages on account of malpractice in the treatment of the aforesaid injury.

For the appellant the cause was submitted on the brief of *Robert R. Freeman* and *Lines, Spooner & Quarles,* attorneys, and *Henry J. Bendinger,* of counsel, all of Milwaukee.

For the respondent there was a brief by *Martin, Martin & Martin* of Green Bay, and oral argument by *Gerald F. Clifford* of Green Bay.

KERWIN, J. The question involved upon this appeal is whether the court below erred in sustaining the demurrer of the plaintiff to the defendant's answer. The separate defenses demurred to are set out in the statement of facts and need not be repeated here. It may be proper to state that sub. 3, sec. 2394—25, Stats., is not involved upon this appeal.

It is insisted by counsel for respondent that it appears from the facts pleaded in defense and demurred to that two separate torts were committed and that settlement for one does not settle the other, and that the principle of release of joint tortfeasors does not apply. The rule invoked by counsel for respondent does not apply in the instant case.

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Whether the master and doctor were in a technical sense joint tortfeasors is not material here, because it is clear upon the allegations of the answer that all damages sustained by the acts of the master and the defendant doctor were settled for and satisfied. The malpractice, if any, contributed to produce the injury settled for and satisfied by the master, hence such cause of action against the defendant was compensated for and extinguished by the settlement made. Clearly the settlement covered all damages sustained, including injury caused by the alleged malpractice. The damages sustained by the acts of the defendant concurred or were connected with the negligence of the master in producing the injury and damages settled for by the master. The receipt given by the plaintiff, and which is not questioned, is broad and shows full settlement for injuries received through the negligence of the master as well as on account of the alleged malpractice of defendant. The alleged wrong of the defendant in treating the injury contributed in large part to the injury sustained by the plaintiff.

In the view we take of the case it is not necessary to decide, and we do not decide, whether the Paper Company and the defendant were joint tortfeasors as the term is ordinarily understood in tort cases. The injury caused by the malpractice would not have occurred but for the original injury and resulted because of such injury and was a proximate result thereof. *Selleck v. Janesville,* 100 Wis. 157, 75 N. W. 975; *Wieting v. Millston,* 77 Wis. 523, 46 N. W. 879; *Stover v. Bluehill,* 51 Me. 439; *Goshen v. England,* 119 Ind. 368, 21 N. E. 977; *Batton v. Public S. Corp.* 75 N. J. Law, 857, 69 Atl. 164; 6 Thompson, Comm. on Neg. § 7211. In 6 Thompson, Comm. on Neg. § 7211, it is said:

"An injured person exercising ordinary care in the employment of a physician to treat his injury may recover for aggravation of the injury resulting from the negligence or mistaken treatment of his physician, these enhanced injuries being generally regarded by the courts as direct results of the original injury."

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The text is supported by the following authorities, among others: *Selleck v. Janesville, supra; Chicago City R. Co. v. Cooney,* 196 Ill. 466, 63 N. E. 1029; *Pullman P. C. Co. v. Bluhm,* 109 Ill. 20, 50 Am. Rep. 601; *Columbia City v. Langohr,* 20 Ind. App. 395, 50 N. E. 831; *Rice v. Des Moines,* 40 Iowa, 638; *McGarrahan v. N. Y., N. H. & H. R. Co.* 171 Mass. 211, 50 N. E. 610; *Reed v. Detroit,* 108 Mich. 224, 65 N. W. 967; *Tuttle v. Farmington,* 58 N. H. 13; *Lyons v. Erie R. Co.* 57 N. Y. 489; *Sandwich v. Dolan,* 34 Ill. App. 199; *Louisville, N. A. & C. R. Co. v. Falvey,* 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

Now it seems clear from the facts stated in the answer, including the release, that the plaintiff accepted the payment mentioned in the release in full satisfaction for all injuries sustained, including the injuries caused by the alleged malpractice. The plaintiff having been paid for all damages which he sustained has no cause of action against the defendant for the same claim or any part of it. *Gray v. Herman,* 75 Wis. 453, 44 N. W. 248; *Ellis v. Esson,* 50 Wis. 138, 6 N. W. 518. In *Hartigan v. Dickson,* 81 Minn. 284 (83 N. W. 1091), at p. 285 it is said:

"It is undoubtedly the rule that where an injured party has accepted satisfaction in full for an injury done to his person, from whatever source it may come, the settlement he has made is so far effected in equity and good conscience that the law will not permit him to recover again for the same injury."

In *Almquist v. Wilcox,* 115 Minn. 37, 131 N. W. 796, the plaintiff was injured through the negligence of the master and was under the care of a physician and died. Claim was made for damages against the master and settled and the claim paid. Afterwards action was brought against the physician for malpractice in treatment of the plaintiff, and

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it was claimed that death resulted from lack of skill of the physician. The court said:

"We are of the opinion, and so hold, that the settlement with Robinson completely extinguished plaintiff's cause of action, and that the demurrer to the answer should have been overruled. . . .

"The settlement with Robinson, therefore, wholly extinguished the cause of action, and that fact constitutes a complete defense to the present action."

We need not consider nor pass upon the question as to the extent of liability of the Paper Company for negligence or error of judgment of the defendant in treating the injuries, because the extent of the liability of the Paper Company for the alleged malpractice is not material upon this appeal for the reason that the settlement and satisfaction made by the Paper Company covered all damages sustained by plaintiff on account of the injury and improper treatment, if any, by the defendant. The receipt is very broad and manifestly was intended to cover all damages sustained by plaintiff as well for the alleged malpractice as for the original injuries. The receipt acknowledges "full satisfaction and discharge of all claims, accrued or to accrue, in respect to all injuries or injurious results, direct or indirect, arising or to arise from" the accident in question. The plaintiff obtained satisfaction for injuries sustained, and is entitled to but one satisfaction.

We are convinced that the answer set up a good defense and that the demurrer should have been overruled.

By the Court.—The order appealed from is reversed, and the cause remanded with instructions to overrule the demurrer and for further proceedings according to law.

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McDOUGALL, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

December 6, 1918—January 7, 1919.

Master and servant: Injury to railway employee: Wrecking operations: Warning of danger: Duty of employer: Assumption of risk: Evidence: Pleading.

1. Plaintiff, a section hand, while working in defendant's yard near a wrecking outfit, was injured by a rail which flew backward from a pile of wreckage from which a pair of trucks was being pulled by said outfit. The jury found, upon sufficient evidence, that the defendant railway company did not know, before starting to remove said trucks, that a rail was so located that it might be caught by them, and did not fail to use ordinary care for plaintiff's safety by failing to examine the wreckage to discover the rail which injured him; but it is *held* that the jury did not thereby find that there was no danger in the work which was or could have been known to defendant by the exercise of ordinary care, and that the evidence sustains further findings by the jury to the effect that the defendant failed to use ordinary care for plaintiff's safety by omitting to warn him of the dangers incident to the work, and that such lack of ordinary care was a proximate cause of the injury.
2. The work which plaintiff was doing at the time of the accident being other than his usual work and the first of its kind in his experience, and being under the direction of a vice-principal other than the one in charge of the wrecking crew, his position as to the wrecking operation was different from that of the members of the wrecking crew, and it was within the province of the jury to find, as they did, that there was no assumption of the risk by him.
3. An allegation in the complaint that "without giving the plaintiff any warning" the defendant negligently operated the derrick of the wrecking outfit so as to cause the trucks mentioned to come in contact with the rail and to hurl it toward the plaintiff, was sufficient, liberally construed, to raise an issue as to defendant's duty to warn plaintiff of the dangers incident to such work.

APPEAL from a judgment of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Reversed.*

The plaintiff, theretofore engaged at common labor and for about six weeks as a section hand by defendant, brought

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an action under the federal employers' liability act for injury sustained by him July 26, 1916. A wreck had occurred just preceding that day in defendant's terminal yard at Ashland, Wisconsin, seven or eight ore cars being derailed and several of them overturned and a portion of the main track torn up and traffic on such main track being delayed. A wrecking engine with derrick, boom, and cable on a platform ahead of it, and with a crew consisting of a foreman, an engineer, conductor, brakeman, and helper, was engaged from early in the morning until the time of the accident in clearing away such wreckage.

The plaintiff with other section hands, under their own foreman, were engaged at the same time in relaying the rails, releveling the track, and retamping the ties, and clearing up the *débris* after the wrecking crew finished their part of the work. Plaintiff, who never before that day had been working around such wrecking outfit, although he had some two months' previous experience as a section hand, was at the time of the accident about twenty feet to the south of the wreckage, facing towards the wrecking outfit, and engaged in tamping ties under rails that had just been relaid on such main track. The cable from the derrick of the wrecking car was attached apparently to the axle of the last pair of trucks of the overturned or derailed cars still remaining of the wreckage, and under the direction of the foreman of the wrecking crew power was applied to the cable, and these trucks, partly covered by the iron ore and *débris* of the wreckage, were pulled for a distance of about two feet toward the wrecking derrick and in a direction away from the place where plaintiff was standing. In making such pull the man in charge of the cable perceived that there was something apparently holding back the trucks more than their mere weight and that an unexpected resistance had been met with, and thereupon shut off the application of the power to the cable. Immediately thereupon a rail swung out and around from the wreckage and flew backward in the direc-

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tion in which plaintiff was standing, and in so flying struck and killed one of the men engaged on the wrecking crew and also struck the plaintiff so that he was seriously and permanently injured.

The court submitted a special verdict. The questions answered by the jury and their answers were as follows:

"(1) Did the defendant have knowledge, before starting to remove the last pair of trucks, that a rail was so located that it might be caught by said trucks? *A.* No."

"(4) If you answer question No. 1 'No,' then did the defendant, at and before the time of plaintiff's injury, fail to use ordinary care for the safety of the plaintiff by failing to examine the wreckage to discover the rail which struck and injured him? *A.* No."

"(6) Did the defendant, while attempting to remove said truck, fail to use ordinary care for plaintiff's safety by omitting to warn plaintiff of the dangers incident to such work? *A.* Yes. (Changed by the court to 'No.')

"(7) If you answer question No. 6 'Yes,' was such lack of ordinary care a proximate cause of plaintiff's injury? *A.* Yes. (Answer stricken out by court.)

"(8) Were the risks incident to plaintiff's employment at the time of his injury such that he assumed them? *A.* No.

"(9) The question of damages, which were assessed by the jury at $3,500.

"(10) Did the plaintiff, by lack of ordinary care on his part, proximately contribute to his injury? *A.* No."

After motions by the respective parties the trial court changed the answers in the verdict as above indicated and thereupon directed judgment in favor of the defendant dismissing the plaintiff's complaint, and from judgment so entered the plaintiff appeals.

William F. Shea of Ashland, for the appellant.

For the respondent there was a brief by *Edward M. Smart,* attorney, and *R. N. Van Doren,* of counsel, both of Milwaukee, and oral argument by *Mr. Van Doren.*

ESCHWEILER, J. The plaintiff moved the court, after verdict, to change the negative answers made by the jury to

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questions 1 and 4, respectively, to "Yes," on the ground that such negative answers were contrary to the evidence. The court, however, denied such motion, and we think properly, as there was evidence to support such respective answers.

Having permitted such negative answers to stand to questions 1 and 4, the court then felt bound, as indicated by his written decision herein, to change the answer "Yes" to question 6 to "No," and to strike out the answer "Yes" by the jury to question 7, on the view, as expressed in his written decision, that, the jury having found that the defendant did not have knowledge, before starting to remove the last pair of trucks, that a rail was so located that it might be caught by said trucks, and by question 4 that it did not fail to use ordinary care for the safety of the plaintiff by failing to examine the wreckage, it was thereby found that there was no danger in the work that was or could have been known to the defendant by the exercise of ordinary care, and that therefore the danger that did exist and resulted in the injury to plaintiff was such an extraordinary or specific danger that there was no legal duty on the part of the defendant to warn the plaintiff, and there was therefore nothing in the record upon which to base the finding by the jury of failure to warn plaintiff embodied in questions 6 and 7 and answers thereto, and that therefore judgment must necessarily follow for the defendant. We are forced, however, to a different conclusion from an examination of the evidence in the record.

In our view of it the substantial question here was not whether this particular rail which swung around from the wreckage and caused the injury was discoverable by ordinary care, but rather whether, from the nature of the work being done, there should have been a reasonable anticipation that injury might result in the operation to any one near the place.

The foreman of the wrecking crew testified that he put the hook, which was on the end of the cable which ran from the boom on the derrick, onto this pair of trucks, which were

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partly covered by sand and gravel; that he could see nothing to indicate what the trucks had hold of, and that in the wreckage there had been ties and pieces of rail mixed up; that after making the cable fast to the trucks he gave the signal to the engineer and was then seeing that when they pulled back the men stood in the clear. Geelan, a section foreman and of eighteen years' experience, had charge of the crew with which plaintiff was working and testified:

"I gave *McDougall* [plaintiff] orders to stand in the clear. . . . The men were all standing aside ten or twelve feet off the main lead. There always is danger. Something is liable to break. It is well to keep out of the danger zone. And I intended that *Mr. McDougall* and the other men should keep back. We generally keep back. I told them to keep back out of the way. . . . I told the men to get into the clear, that they were going to pull. They were all there in a row. They didn't get out of the way; they got hit."

The plaintiff and other witnesses testified that no such warning or directions were given by the section foreman to them. It therefore became an issue of fact as to whether or not such warning was given, and the jury evidently adopted plaintiff's version of the transaction, and we cannot say that such a finding can be disturbed.

In passing upon this sixth question, therefore, the jury had warrant for believing that the vice-principal, Geelan, plaintiff's foreman, appreciated that there was danger incident to such work, even to men working beyond the end of the cable, from his testimony just quoted and particularly his statement that he did warn men so placed to get into the clear, and they may have believed what was his apparent view of the necessity of warning and yet have been convinced by the testimony of plaintiff and others that Geelan was mistaken in saying that he did give the warning.

The work done by plaintiff at the time of the accident being other than his usual work and the first of its kind in his experience and under the direction of a separate and distinct vice-principal from the one in charge of the wreck-

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ing crew, who testified, "I did not see *Mr. McDougall* at that time [of accident]. . . . I had nothing to do with him. I didn't know him. When I wanted a man I would go to the section foreman and ask for one," made his position substantially different as to this wrecking operation from that of members of the wrecking crew itself, and it was therefore within the province of the jury to find, as they did, that there was no assumption of the risk by him.

It is urged by respondent that question No. 6, involving the duty to warn, was not an issue presented by the pleadings. A number of alleged grounds for liability were charged by plaintiff in his complaint, upon some of which no evidence was offered and some of which, as indicated by the answers of the jury to questions 1 and 4, were found against him; but the complaint did contain the allegation that "without giving the plaintiff any warning" the defendant carelessly and negligently operated the derrick so as to cause the trucks to come in contact with the rail and to hurl it toward the plaintiff, and this should be held sufficient in view of the liberality with which pleadings are nowadays treated, and especially where, as here, the testimony having been received at the trial as to the warning claimed to have been given by defendant's foreman to the plaintiff and denied by him, the submitting of the issue raised by such testimony made such objection immaterial.

We are therefore satisfied that the trial court was not justified in changing the answers of the jury to the sixth question and in striking out the answer to the seventh, or in granting judgment for the defendant, and that there is upon the verdict as returned by the jury sufficient to require a judgment to be entered thereupon in favor of the plaintiff.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment in favor of the plaintiff for the amount of damages found by the jury.

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CLAUSEN, Appellant, vs. FOND DU LAC COUNTY, Respondent.

December 6, 1918—January 7, 1919.

Officers: De jure and de facto: Payment of salary to de facto officer: Liability to pay again to de jure officer.

1. An invalid statute, by its terms, abolished a county court and transferred its powers and functions to a superior court thereby created. A judge of the new court was appointed, who took possession of the records, etc., and entered upon his duties. Plaintiff had for some time been the clerk and phonographic reporter of the county court, but the new judge appointed another person as such reporter of the superior court, and she performed all the duties of reporter and clerk of said court until the statute was declared void. *Held* that, as said judge became the *de facto* judge of the county court (163 Wis. 34), so his appointee became the *de facto* clerk and reporter of that court; but that plaintiff remained the *de jure* clerk and reporter.
2. The county having paid a monthly salary to said *de facto* clerk and reporter in reliance upon the fact that she had possession of the office under color of title and was discharging its duties, cannot be compelled to pay such sums again to plaintiff as the *de jure* officer, but plaintiff may recover from the county the amount by which his lawful salary exceeded the monthly salary so paid to the *de facto* officer, and also the amount of a payment to the *de facto* officer for the last fractional month of her service, such payment having been made after she had ceased to act and the validity of plaintiff's title to the office had been established.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

This is an appeal from a judgment affirming the disallowance by the county board of Fond du Lac county of plaintiff's claim for salary as clerk and phonographic reporter of the county court of said county from September 1, 1915, to February 23, 1916.

The facts were stipulated and were in substance as follows: Plaintiff on September 1, 1915, was, and for some time prior thereto had been, the duly appointed and qualified

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clerk and phonographic reporter of the county court of Fond du Lac county, at a salary of $1,000 per year, payable in equal monthly instalments. By ch. 518, Laws 1915, said county court was in terms abolished and all its functions and powers transferred, on and after September 1, 1915, to a court called in that act the superior court of said county, of which new court F. W. CHADBOURNE was appointed judge by the governor. Said CHADBOURNE entered on his duties September 1, 1915, and the judge and clerk of the county court at that time gave up possession of the office and records under protest, claiming the act creating the new court to be void. Judge CHADBOURNE declined to appoint the plaintiff to the position of phonographic reporter in the new court and on the 2d day of September, 1915, appointed one Harriet G. Morse phonographic reporter of said last named court, and from that time until February 22, 1916, said Harriet G. Morse performed all the duties of phonographic reporter and clerk of said superior court and excluded the plaintiff therefrom, at a salary of $75 per month, which was regularly paid by the county for five months, *i. e.* up to February 1, 1916. On February 22, 1916, in a *quo warranto* action brought in this court, it was held that the act creating said superior court was void. *State ex rel. Richter v. Chadbourne,* 162 Wis. 410, 156 N. W. 610. On February 23, 1916, said CHADBOURNE and his appointees vacated their supposed offices and the county judge and the plaintiff resumed the active performance of their duties. They announced their readiness to perform their duties at the time of their ouster from office, and the plaintiff filed a claim for his monthly salary each month, each time stating that he was ready and willing to perform his official duties. June 15, 1916, the county paid to Miss Morse $56.25, being her salary from February 1 to February 23, 1916.

The trial court held that the plaintiff was removed from office by the *de facto* judge of the county court and that such removal was a valid act, just as much as a judgment or

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purely judicial act of said *de facto* judge, and hence that the plaintiff was rightly denied any salary.

For the appellant there was a brief by *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Harold M. Wilkie.*

L. J. Fellenz of Fond du Lac, for the respondent.

WINSLOW, C. J. There is much respectable authority to the effect that appointments to office by a *de facto* officer are as valid and effectual as though made by a *de jure* officer. 2 Dillon, Mun. Corp. § 519 and authorities cited; 8 Am. & Eng. Ency. of Law (2d ed.) 822. The other view is taken in England and by some authorities in this country. *In re Ringler & Co.* 204 N. Y. 30, 97 N. E. 593. It is not necessary to decide the question in this case and we intimate no opinion thereon. In the case before us Judge CHADBOURNE appointed a clerk and phonographic reporter for the supposed superior court, a court which never had a legal existence, but he never appointed a clerk or phonographer for the county court. To hold that a person appointed by a *de facto* officer to hold a *de facto* office thereby becomes the *de jure* holder of an entirely different and *de jure* office seems not logical. We therefore hold that the plaintiff remained the *de jure* clerk and phonographer of the county court notwithstanding the appointment of Miss Morse.

Another question arises here, however. Under the logic of the decision in the case of *In re Woolcott,* 163 Wis. 34, 157 N. W. 553, Miss Morse was the *de facto* clerk and phonographer of the county court from the time of her appointment until February 23, 1916. Miss Morse drew the salary of $75 per month during that time. The county paid her this salary (up to February 1st) in reliance on the fact that she had possession of the office under color of title and was discharging its duties. Can it be compelled to pay these sums again to the *de jure* officer? This question has not been decided in this court. It was referred to in the case

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of *Kempster v. Milwaukee,* 97 Wis. 343, 72 N. W. 743, but was not there decided because it was held that the supposed *de facto* officer in that case was a mere intruder and hence the question of the effect of payment to a *de facto* officer did not arise.

It was correctly stated in that case that the decided weight of authority favors the rule that the *de jure* officer cannot recover from the municipality the sums so paid to the *de facto* officer. See, also, 29 Cyc. 1430 and cases cited. The logic of these decisions is, not that the *de facto* officer is entitled to the money, but that the disbursing officers of the municipality ought not to be required to try and decide the question as to which claimant is entitled to the salary, at the peril of double payment by the municipality if the question be decided wrongly; that the most important consideration is that the public business shall proceed without interruption, and that this result is most likely to be accomplished by payment to the person in possession of the office under color of title discharging its duties.

We think this proposition is correct both upon reason and authority and adopt it. It results that there can be no recovery for the amount of the payments made to Miss Morse for the five months, from September 1st to February 1st, but as these payments were at the rate of $75 per month (while the plaintiff's salary was at the rate of $83.33 per month) there is left the sum of $8.33 per month which the plaintiff should be allowed for these months. As to the amount paid for the salary for the first twenty-two days of February, it is quite apparent that the county is not protected by the principle above stated. This payment was not made until June 15, 1916, long after the *de facto* officer had ceased to act and the validity of the plaintiff's title to the office had been established by this court. Such payments do not come within the reason of the rule. There can be no excuse for paying salary to a *de facto* officer after the court of last resort has declared his incumbency unlawful to the

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knowledge of the disbursing officers and he has ceased to act. All unpaid dues or salary pertaining to the office should then be paid to the *de jure* officer. *Scott v. Crump,* 106 Mich. 288, 64 N. W. 1; *Fylpaa v. Brown Co.* 6 S. Dak. 634, 62 N. W. 962; *McVeany v. Mayor, etc.* 80 N. Y. 185. Manifestly the plaintiff is entitled to recover his salary for the first twenty-two days of February. It results that the action of the county board disallowing the plaintiff's demand *in toto* should have been reversed and judgment entered for the plaintiff for $41.66, being the balance of his salary not paid to the *de facto* officer for the five months beginning September 1, 1915, and for the amount due him for the first twenty-two days of February, 1916.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the plaintiff as indicated in the opinion.

FRINT MOTOR CAR COMPANY, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

December 6, 1918—January 7, 1919.

Workmen's compensation: Injury to employee at automobile races: "Service growing out of and incidental to his employment:" Violation of instructions: "Wilful" disobedience: Reduction of compensation: "Casual" employment: Violation of Sunday law: Validity of contract of employment.

1. A mechanic was given charge of his employer's pit at automobile races, with instructions to work on the cars there and not to leave the pit. Contrary to orders he left the pit and stood upon the fence at the inside of the race track. While there, during a race, he saw one of his employer's cars stop on the track a short distance away. He ran toward it, but before reaching it was struck by an oncoming car and killed. *Held,* that he was at the time performing service growing out of and incidental to his employment, and that the mere fact that he had disobeyed orders did not preclude an award of compensation for his death.
2. Under sub. (5) (j) (k), sec. 2394—9, Stats., providing for reduction of compensation fifteen per cent. where injury re-

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sults from the employee's wilful failure to obey any reasonable rule adopted by the employer for his safety, the disobedience must, in order to have such effect, have been deliberate, not merely a thoughtless act on the spur of the moment.

3. Where a mechanic regularly employed in a warehouse to keep automobiles in proper condition was temporarily transferred to similar work at races in which, for advertising purposes, his employer had entered cars, the latter employment was not casual, even though entering cars in races was not a part of the regular work of the employer.
4. Where the relation of master and servant existed prior to and on the day of an accident in which the servant was injured while doing work for the master in the line of his duty, the mere fact that he was at the time violating the Sunday law does not preclude an award of compensation, where such violation did not contribute to the injury.
5. The right of recovery under the compensation act does not depend upon the validity of the contract of employment.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appellant is a corporation and at the time of the accident had a salesroom in Milwaukee. August 5, 1917, the deceased, Carl Healey, was in the employ of the appellant as a mechanic, working at the warehouse, getting $25 a week and overtime at the same rate. Automobile races had been arranged for by the Wisconsin Auto Racing Association at the State Fair Park, near Milwaukee, Saturday, August 4, and Sunday, August 5, 1917. Different dealers entered cars in these races for the purpose of promoting the names of their various cars and getting them before the public. This was the purpose of the appellant. The appellant had on other occasions entered cars in similar races, although entering cars in races was not a part of the regular work of appellant.

Each company entering cars had assigned to it certain space inside of the track near the starting mark, called a pit, and was permitted to have two men in each pit for the purpose of handing out spare parts, gasoline, etc. Healey, after

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doing work on the racing cars, was given charge of the pit of the appellant and was instructed to work on the cars at the pit and see that they were properly tuned up and to remain there. On the afternoon of the day of the accident Healey had gotten out of the pit and was standing on the fence at the inside of the track. One of the appellant's cars stopped a short distance from the pit, and Healey, seeing the car stop, ran up to where it was standing, and after getting in front of it he was run into by another car and killed.

The *Industrial Commission* awarded *Nettie Healey* $2,782.85 against the appellant because of the death of her husband, Carl Healey. The court below confirmed the award of the *Industrial Commission* and rendered judgment accordingly, from which this appeal is taken.

The cause was submitted for the appellant on the brief of *Lines, Spooner & Quarles* of Milwaukee, and for the respondent *Industrial Commission* on that of the *Attorney General* and *Winfield W. Gilman,* assistant attorney general.

KERWIN, J. Three main contentions are made in this case: (a) That the accident was not an industrial accident; (b) that the employment was but casual; and (c) that the employment was a Sunday employment and no recovery could be had for injury resulting therefrom.

1. Prior to the day of the injury, Healey, deceased, was in the employ of appellant under the compensation act, and at the time of the injury was performing services growing out of and incidental to his employment, unless it can be said that because he left the pit provided for him during the races he thereby got outside of the course of his employment. The contention of appellant is that because Healey left the pit provided for him and went upon the track where he was killed, he was not at the time of the injury within the course of his employment, hence no recovery could be had. We regard this contention untenable. The mere fact

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that Healey was instructed to remain in the pit and that he violated such instruction did not put him outside of the scope of his employment.

It appears from the record that during the course of one of the races a car of appellant skidded and came to a stop near the fence, a short distance from the point where Healey was standing upon the fence watching the races. As soon as his employer's car stopped he jumped from the fence and ran toward it, but before he reached it was struck by an oncoming car and killed. We are satisfied that deceased was at the time of the injury acting within the scope of his employment, and the mere fact that he disobeyed orders does not defeat recovery. *Whitehead v. Reader,* 3 Workm. C. C. 40; *Northern Ind. G. & E. Co. v. Pietzvak* (Ind.) 118 N. E. 132; *Louisville & N. R. Co. v. Fleming,* 194 Ala. 51, 69 South. 125; *Chicago R. Co. v. Industrial Board,* 276 Ill. 112, 114 N. E. 534; *Watkins v. Guest, K. & N. Ltd.* 5 Butterworth's Workm. C. C. 307; *Kolaszynski v. Klie* (N. J. Law) 102 Atl. 5; *Milwaukee v. Industrial Comm.* 160 Wis. 238, 151 N. W. 247; *Manitowoc B. Works v. Industrial Comm.* 165 Wis. 592, 163 N. W. 172.

Counsel for the appellant refer to sub. (5) (j) (k), sec. 2394—9, Stats., relating to reduction of compensation fifteen per cent. in case of wilful failure to obey any reasonable rule adopted by the employer for the safety of the employee. We are of opinion that there was no wilful failure to obey a rule of the employer by Healey within the meaning of the statute. Mere violation of a rule does not always constitute wilful misconduct. To have that effect the disobedience must have been deliberate, not merely a thoughtless act on the spur of the moment. *Nickerson's Case,* 218 Mass. 158, 105 N. E. 604; Ann. Cas. 1916A; *U. S. F. & G. Co. v. Industrial Acc. Comm.* 174 Cal. 616, 163 Pac. 1013; *Diestelhorst v. Industrial Acc. Comm.* 32 Cal. App. 771, 164 Pac. 44; *Rumboll v. Nunnery C. Co.* 1 Workm. C. C. 28; *Reeks v. Kynoch,* 4 Workm. C. C. 14.

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2. It is contended that Healey's employment was but casual. He was a regular employee of appellant, and his work was not materially different at the time of the accident from that which he ordinarily did. He was a mechanic, kept cars in proper condition, and was working in the regular course of such employment at the time of the injury, therefore his employment was not casual. *Holmen C. Asso. v. Industrial Comm.* 167 Wis. 470, 167 N. W. 808; *F. C. Gross & Bros. Co. v. Industrial Comm.* 167 Wis. 612, 167 N. W. 809; *Jordan v. Weinman,* 167 Wis. 474, 167 N. W. 810.

3. It is also insisted that because the accident occurred on Sunday there can be no recovery. The contract of employment with Healey was made prior to the date of the accident, and on the day of the accident and prior thereto the relation of master and servant between appellant and Healey existed, as well as the duty imposed by law upon appellant to make compensation for injuries arising out of the relation existing by force of the workmen's compensation act. The fact that Healey was violating the Sunday law cannot defeat recovery, because it did not contribute to the injury. The right of recovery was fixed by the statute and the relation lawfully existed between appellant and Healey at the time of the accident.

While the decisions in ordinary tort actions before the workmen's compensation act was passed cannot be said to be strictly in point, some of the reasoning in these cases is pertinent. *McArthur v. Green Bay & M. C. Co.* 34 Wis. 139; *Knowlton v. Milwaukee City R. Co.* 59 Wis. 278, 18 N. W. 17; *Gabbert v. Hackett,* 135 Wis. 86, 115 N. W. 345; *Gerretson v. Rambler G. Co.* 149 Wis. 528, 136 N. W. 186; *Gross v. Miller,* 93 Iowa, 72, 61 N. W. 385, 26 L. R. A. 605.

In *McArthur v. Green Bay & M. C. Co., supra,* in speaking upon this subject the court said, in effect, that the same state of facts which would entitle plaintiff to recover had the injury happened on any day other than Sunday would

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entitle him to recover notwithstanding the accident occurred on Sunday and while he was unlawfully navigating the canal.

And in *Knowlton v. Milwaukee City R. Co., supra,* it is held that the right of the plaintiff to recover is not affected by the fact that he was violating the Sunday law, because he did not thereby become an outlaw, but was as much within the protection of the law and was entitled to the same degree of care by the defendant to protect him from injury as though he had postponed his ride on the defendant's car until the following day.

The reasoning in *Gross v. Miller, supra,* is in line with the Wisconsin cases above cited and it is held that the fact that one is injured while violating a Sunday law in no way interferes with or prevents the right of recovery for the injuries sustained, because such mere violation in no way contributed to the injury; in such cases violation of a Sunday law is not the proximate or efficient cause of the accident.

The basis of recovery under the workmen's compensation act is that the injury be proximately caused by the accident and is not intentionally self-inflicted. Sub. (3), sec. 2394—3, Stats. The fact that the work was being done on Sunday did not abrogate the relation of master and servant between appellant and Healey. *Houston & T. C. R. Co. v. Rider,* 62 Tex. 267. And this court has held that, although the employment contract be illegal, it does not destroy operation under the workmen's compensation act. *Foth v. Macomber & Whyte R. Co.* 161 Wis. 549, 154 N. W. 369.

Nor do we think that the right of recovery under the compensation act depends upon the validity of the contract of employment. 1 Honnold, Workm. Comp. 30.

Whatever the contract may be, while the servant is doing work for the master in the line of his duty the law imposes upon the master the duty of making the prescribed compensation for industrial accident. In such a case the injured party does not have to resort to the illegal act to make his

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case. The relation of master and servant as well as the statute providing for compensation persist independent of the Sunday statute. *Hughes v. Atlanta S. Co.* 136 Ga. 511, 71 S. E. 728, 36 L. R. A. N. S. 547; *Neanow v. Uttech,* 46 Wis. 581, 1 N. W. 221; *Walker v. Ontario,* 111 Wis. 113, 86 N. W. 566; *Derr v. C., M. & St. P. R. Co.* 163 Wis. 234, 157 N. W. 753.

We are satisfied that the judgment of the court below is right and must be affirmed.

By the Court.—The judgment appealed from is affirmed, with costs.

STATE EX REL. GISHOLT MACHINE COMPANY, Respondent, vs. NORSMAN, Clerk, etc., Appellant.
SAME, Appellant, vs. SAME, Respondent.

October 11, 1918—February 4, 1919.

Taxation: Machinery as fixtures: Intent: Evidence: Valuation of land and improvements: Methods.

1. Machinery adapted to the purposes of a manufacturing plant becomes, when installed therein and connected with the building by wires or belts, a part of the freehold, and the land, buildings, and machinery so attached constitute an entity and pass by deed, mortgage, or other conveyance of the land.
2. The machinery in a machine-tool factory ranged from very small machines to those weighing thirty to forty thousand pounds, all being adapted to the purposes of the plant. For the most part they were held in position by their own weight and were neither bolted nor screwed to the floor, but were all attached either to electric motors by wires or to the steam power plant by belts and pulleys. Any part of the solid concrete floors was of sufficient strength to support the weight of the heaviest machine; and the machines were occasionally moved from place to place in the factory to suit the varying convenience and necessities of the plant. *Held,* that they were fixtures and were properly assessed for taxation as part of the realty, under sec. 1035, Stats.
3. Although the question of whether property constitutes fixtures is largely one of intent, yet where the property is adapted to the use to which the realty is devoted its use in such manner is such strong evidence of intent to make it a part of the free-

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hold as not to be overcome by the fact that it was carried on the books of the owner as movable equipment.

4. In valuing real property for taxation the assessor started several blocks from the manufacturing plant in question, towards the business section of the city, placed a front-foot value on the lots at this point, and then reduced the front-foot valuation by blocks as he proceeded toward the plant. He also considered the fact that certain blocks had sidetrack facilities, and gave due regard to the actual value of land as reflected by sales in the vicinity, and to the sworn testimony of presumably competent persons on other occasions as to real-estate values in that part of the city. *Held,* that the valuation so arrived at was not governed by an arbitrary rule and was in compliance with the requirement of sec. 1052, Stats., that "real property shall be valued by the assessor from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale."
5. Under sec. 1052, Stats., the assessor should value separately the land and the buildings and arrive at the total valuation by adding the two items together. He should not find first the value of the land and improvements as a whole and then apportion such total value between land and improvements.
6. In valuing factory buildings and machinery constituting fixtures therein, the original cost less depreciation was a sufficient basis for the formation of an honest judgment and, no better method being suggested, and no reason appearing why such original cost should be further discounted to arrive at the actual cash value or the value that might reasonably be expected to be obtained for the property at private sale, an assessment on that basis was a compliance with sec. 1052, Stats.

APPEALS from a judgment of the circuit court for Dane county: JAMES WICKHAM, Judge. *Reversed on defendant's appeal; affirmed on that of plaintiff.*

Certiorari proceedings to review the action of the board of review of the city of Madison in affirming the assessment made of relator's property by the assessor. The circuit court held that certain property assessed as real estate should have been assessed as personal property, in which particular the action of the board of review was reversed and in all other respects affirmed. Both parties appeal.

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For the relator there was a brief by *Olin, Butler, Stebbins & Stroud* of Madison, and oral argument by *H. L. Butler* and *R. M. Stroud.*

William Ryan, city attorney, for the defendant.

The following opinion was filed November 6, 1918:

OWEN, J. The *Gisholt Machine Company* is the proprietor of a machine-tool manufactory located in the city of Madison. Its plant consists of several factory buildings of standard design and covers six or seven city blocks. It is equipped with various kinds and types of machinery adapted for the purpose of the manufactory. A part of this machinery which the assessor valued at the sum of $301,173 was assessed by him as real estate or land improvements. The relator contends, and the circuit court held, that this machinery is personal property and should have been so assessed. This presents the main question for consideration. It is important, because if the property be assessed as personalty the tax paid thereon operates as an offset to the income tax paid by the relator.

The machinery in question ranged from very small machines to machines weighing thirty or forty thousand pounds. For the most part they were held in position by their own weight and were neither bolted nor screwed to the floor. All, however, were attached either to electric motors by electric wires or to the steam power plant by belts and pulleys. The floors of the buildings were of solid concrete construction and any part thereof was of sufficient strength to support the weight of the heaviest machine. The machines are occasionally moved from place to place in the factory to suit the varying convenience and necessities of the plant. For only one machine in the plant, valued at a few thousand dollars, was it necessary to build a pit, and even that machine could be moved in the same manner as the others, no structural change being required beyond the filling of the pit. All of this machinery was adapted to the purposes of the manufactory.

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Sec. 1035, Stats., provides that "the terms 'real property,' 'real estate' and 'land,' when used in this title, shall include not only the land itself, but all buildings, fixtures, improvements, rights and privileges appertaining thereto." The assessor considered this machinery to be fixtures and assessed it as a part of the land. It appears that a part of this factory and a part of the machinery here in controversy were located on land not owned by the relator, but held by it under lease from the owner. The terms of the lease, however, are not disclosed by the record, and it was frankly stated upon the argument that no importance was attached to this fact. We therefore lay out of the case any consideration of the question as affected by the relation of landlord and tenant, and nothing said herein is to be construed as affecting or modifying the decisions of this court in dealing with the question of fixtures arising between landlord and tenant. The question is here treated as though the machinery were located on land owned entirely by the relator. So considered, the question is ruled adversely to the contentions of relator by a long line of decisions in this state. *Frankland v. Moulton,* 5 Wis. 1; *Kimball v. Darling,* 32 Wis. 675; *Taylor v. Collins,* 51 Wis. 123, 8 N. W. 22; *Kendall M. Co. v. Rundle,* 78 Wis. 150, 47 N. W. 364; *Homestead L. Co. v. Becker,* 96 Wis. 206, 71 N. W. 117; *Gunderson v. Swarthout,* 104 Wis. 186, 80 N. W. 465; *Fuller-Warren Co. v. Harter,* 110 Wis. 80, 85 N. W. 698. The effect of these decisions is that when machinery adapted to the purposes of a manufacturing plant is installed therein and connected with the building by wires or belts, such machinery becomes a part of the freehold, and the land, buildings, and machinery so attached constitute an entity and pass by deed, mortgage, or other conveyance of the land. This doctrine is so firmly written into the decisions of this court as to have become a rule of property in this state, which it is our duty to respect and protect.

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An attempt to distinguish this case from the prior decisions of this court upon that question would introduce refinements which would result in uncertainty and confusion. Neither business nor general interests would be promoted by such an attempt. A principle of law in the nature of a rule of property once established should be adhered to. If the rule be deemed wrong it may be changed by the legislature, but property interests should not be jeopardized by judicial vacillation. Because we consider this case to fall within the scope of our previous decisions it is unnecessary to indulge in a discussion of the underlying principles by which the question of whether certain property is to be regarded as fixtures is tested. It is proper to say, however, in response to relator's contention that this machinery should be considered personal property because of the fact that it was carried on the books of the company under the head of movable equipment, indicating an intention on the part of the company to preserve its character as personal property, that the act of the company in installing this machinery in its manufacturing plant, connecting it up by wires and belts to the building, constitutes greater, if indeed it should not be considered conclusive, evidence of its intent in the premises. It is true that the question of whether property constitutes fixtures is largely one of intent. But where property is adapted to the use to which the realty is devoted, the use thereof in such manner furnishes such strong evidence of intent to make it a part of the freehold as not to be overcome by bookkeeping practices. *Hannon v. Kelly,* 156 Wis. 509, 146 N. W. 512, and cases cited.

Relator contends that the assessor adopted arbitrary and, therefore, illegal methods in valuing its real estate. It appears that the assessor started several blocks away from the plant, toward the Capitol Square. He placed a front-foot value on the lots at this point and then reduced the front-foot valuation by blocks ($5 per block) as he proceeded from this block, away from the Capitol Square. It is argued

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that this method of assessment is condemned by this court in *Hersey v. Barron Co.* 37 Wis. 75. We adhere to the rule therein expressed, and if it appeared here that the assessment of relator's real estate was made pursuant to arbitrary rules such as were followed by the assessor in that case it would meet with the same condemnation. The record does not impress us, however, with the thought that the assessor in assessing relator's real estate, or real estate in that vicinity, was governed by any arbitrary rule. It is well known that in cities real-estate values decrease in proportion to the growing distance from the center or business part of the city. The assessor in this case gave due consideration to that fact and, in giving effect to that element of value, decreased the front-foot value of lots fronting on Washington avenue by $5 per foot in each succeeding block. There is nothing in the record to indicate that this was either unreasonable or unfair. As showing that the assessor made a rather comprehensive and intelligent survey of the entire situation in arriving at his values of real estate, we quote from his testimony. He said:

"In placing the valuation of the land on these particular blocks, I believe you would have to consider the entire section of the city between Blount street and the river and Washington avenue and Williamson street. I want to point out that we assessed land in block 132 at $65 and have it scaled down to $40 in 215 and 216. I want also to point out that we have a number of actual sales which I believe will hold that valuation. For example, we have these sales in block 171, which I spoke of. Although selling at $75 and $100 a front foot we have assessed at $55 per front foot because we thought they were too high. Here is the Gisholt block, next to it, at $50 per front foot. I want to point out that although Mr. Swensen had a sidetrack running through this block the long way of the block, that 187 also has sidetrack facilities, the same as 171. We also had this evidence of values in the block this way: There is an option on lots 5 and 6 at $60 per front foot, although we have assessed that block at $55 per front foot. There was recently a sale

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in block 144, the Garry property, at $76 per front foot. We have also had the sale of lots 10 and 11 in block 145 at $9,000, $4,500 a lot. We have also had a Cooley sale here at $75 for two lots. We also have the Case sale, two lots and a fraction at $15,000, plus the street assessment, which brought it up to $17,000. This property is not worth more than the Gisholt lots are, but I do want to point out that a glance at this map will show that we have this property up here around Blount street at about what it is sold for, and we have gradually scaled the value down to the river. I would also ask the board to consider the sworn testimony of Mr. Swensen, Mr. Cross, and Mr. Riley in the rate case hearing, in which he testifies as to the valuation of a lot of these lots in that section, and I want to point out that our assessment is about 65 per cent. of what he testified that land is worth."

It thus appears that the assessor took into consideration many elements of value, even the fact that certain blocks had sidetrack facilities, and that he gave due regard to the actual value of lands as reflected by actual sales made in the vicinity, as well as to sworn testimony given presumably by competent persons on other occasions concerning real-estate values in that territory, all of which negatives the idea that his assessment was arbitrary or governed by any rule-of-thumb method. The record is convincing that the assessor keenly appreciated his responsibilities and legal duties, and that the value placed by him upon the real estate of relator reflects his honest, mature, and intelligent judgment upon that question and shows obedience to the commands of the statute, sec. 1052, which provides that "Real property shall be valued by the assessor from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale."

Fault is also found with the assessment because the assessor valued the land independent of the buildings, and then valued the buildings independent of the land, and arrived at a total valuation by adding the two items together. It is

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argued that, in order to comply with the statute, the assessor should have adopted the inverse method and should have first found the value of the land and improvements as a whole and then apportioned the total so found to real estate and to improvements. We do not so understand the statute. Sec. 1052 requires the assessor to enter in one column "the value of the land, exclusive of the buildings thereon; in a separate column under the head 'Improvements,' he shall enter the value of such buildings, together with machinery and fixtures therein, if any, not separately assessable, as personal property; and in the third column he shall enter the value of both land and improvements." Compliance with this provision requires the assessor to first assess the real property irrespective of any buildings or improvements thereon. Two lots lying side by side, one having improvements thereon and the other with no improvements, should be valued the same, if the improvement is the only element of difference in the value. Having arrived at the value of the lot in this manner, the improvement should then be valued and set down in another column. This was the manner in which the assessor proceeded in valuing relator's property, and we hold that it was in strict compliance with the statute.

In arriving at the value of the buildings and machinery which he assessed as fixtures the assessor gave due regard to the cost thereof to the relator less the annual depreciation which had been charged off on the books of the company, the assessor satisfying himself that such depreciation had not been excessive. It is complained that this method of assessment does not satisfy the demands of the statute, which requires the property to be assessed "at the full value which could ordinarily be obtained therefor at private sale." It is argued that the market value of the land itself without any buildings thereon plus the original cost of the buildings less depreciation does not fix the value which could ordinarily be obtained for the plant at private sale. This argu-

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ment, however, is not coupled with any suggestion of a better method for arriving at the result. It is matter of common knowledge that large manufacturing establishments such as this are not subject to frequent transfers so that the market value could be established in such way. The president of the concern, testifying, said: "I cannot testify as to what our plant is worth as a unit and as a going concern, because the purchases of anything of that kind are few and far between." Under such circumstances we can think of no better method than the one adopted by the assessor for arriving at a fair valuation of the property, which was certainly a sufficient basis for the formation of an honest judgment. It is recognized that the question of whether the business is a paying one might under some circumstances be a material consideration in valuing the improvements. The evidence here, however, is that this business was started in one corner of the Fuller & Johnson manufacturing plant, at which time it amounted to little or nothing. In 1890 the company built a small wooden structure which was its first building. It has grown until now its physical property is assessed at over $2,000,000. There is some testimony that since the breaking out of the war the profits have been abnormal, and that for a few years prior thereto there were no profits. But it was also said that this kind of a business has its ups and downs. There are good years and poor years. The history of the concern, during the period of its existence, shows that on the whole it is a very profitable business. At least there is no reason indicated by any of the facts and circumstances in this case why the original cost of the physical property less depreciation should be further discounted to arrive at its actual cash value or the value that might reasonably be expected to be obtained therefor at private sale. The record fully justifies the action of the assessor as well as that of the board of review in confirming his assessment. The action of the board of review should have been affirmed.

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By the Court.—The judgment of the circuit court is reversed on defendant's appeal and affirmed on plaintiff's appeal, and remanded with instructions to enter judgment affirming the order of the board of review.

A motion for a rehearing was denied, with $25 costs, on February 4, 1919.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Respondent, vs. LAUBENSTEIN, Appellant.

November 9, 1918—February 4, 1919.

Principal and agent: Breach of duty by insurance agent: Knowledge as to false statements in application: Cause of action: Special verdict: Changing answers: Findings by court: Trial: Course and conduct: Discretion.

1. In an action by an insurance company for an alleged breach of duty by an agent, the facts (established by the evidence and verdict) that statements in an application for a policy were false; that they were known to be false by defendant, who transmitted the application to plaintiff; that plaintiff believed such statements to be true and relied thereon in issuing the policy, and was justified in so doing; that the false statements exerted a material influence upon the minds of plaintiff's officers so as to induce it to accept the risk and issue the policy; and that plaintiff sustained damages in consequence thereof—constituted a complete cause of action against the defendant.
2. A negative answer in the special verdict to the question whether the false statements exerted a material influence upon the minds of plaintiff's officers so as to induce it to accept the risk and issue the policy, is *held* upon the evidence to have been properly changed to an affirmative by the trial court. [Whether that finding was immaterial and whether the statements constituted a warranty by the insured, not decided.]
3. It is not error for the trial court to refuse to make a finding upon an issue sufficiently covered by the questions submitted for a special verdict.
4. The order in which witnesses shall be examined and cross-examined, the form of questions, and the manner in which the trial of a case shall be conducted, are matters largely within the discretion of the trial court.

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APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

This action was brought to recover damages growing out of an alleged breach of duty by the defendant as agent of the plaintiff. The breach of duty consisted in causing a policy of insurance to be issued by the plaintiff upon the property of one Anna Huntington upon her application, which defendant knew to be false.

The case was here before and is reported in 162 Wis. 165, 155 N. W. 918. In the former case, after the evidence was in, the court directed a verdict for the defendant, dismissed the complaint, and upon plaintiff's appeal the judgment was reversed, and the cause remanded for retrial. Upon retrial the court submitted the case to the jury on a special verdict consisting of twenty-two questions, among others the following:

"(2) Was the answer to the following question false, to wit: 'How many acres of land do you own? *A.* 41.' *A.* Yes.

"(3) Was the answer to the following question false, to wit: 'What is the cash value of your land alone? *A.* $600–$800 at present.' *A.* Yes."

"(9-B) Did the defendant know that the answer to the following question was false: '*Q.* How many acres of land do you own? *A.* 41.' *A.* Yes.

"(9-C) Did the defendant know that the answer to the following question was false: '*Q.* What is the cash value of your land alone? *A.* $600–$800 at present.' *A.* Yes.

"(18) Did the plaintiff or any of its authorized officers, authorized to accept said insurance, believe said answers and information and rely upon said answers and information in accepting and issuing said insurance policy? *A.* Yes.

"(19) Did the answers to said questions and information in said application for insurance exert a material influence upon the minds of the officers of the plaintiff company, authorized to accept and issue said insurance policy, so as to induce said plaintiff to accept said risk and issue said policy? *A.* No.

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"(20) Under all the facts and circumstances of this case, ought the officers of the plaintiff company, authorized to accept said risk and issue said insurance policy, to have relied upon the answers to said questions and information set forth in said application? *A.* Yes.

"(22) What sum did the plaintiff pay Anna Huntington as a loss caused by fire, under said policy? *A.* $900, December 20, 1913."

The court changed the answer of the jury to the nineteenth question from "No" to "Yes" and ordered judgment upon the verdict as amended. Judgment was entered accordingly, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *Dillett & Winter* of Shawano, and for the respondent on that of *Grady & Farnsworth* of Portage.

The following opinion was filed December 3, 1918:

KERWIN, J. Several errors are assigned, which, so far as material to be considered, raise the following questions: (1) Whether the court erred in changing the answer of the jury to the nineteenth question. (2) Whether the court erred in refusing to find that the defendant did not act in bad faith and in refusing to find either good or bad faith of the defendant. (3) In refusing to set aside the answer of the jury to the effect that the defendant knew that the insured did not own forty-one acres of land, and knew that the same was not of the value of from $600 to $800. (4) That the court erred in restricting the right of the defendant to introduce evidence and unduly interfered with the defendant's right to cross-examine witnesses.

1. It is insisted that there was evidence to support the answer of the jury to the nineteenth question. The evidence on this finding is practically undisputed. There is positive evidence in the record, coming from the officers of the plaintiff, to the effect that the policy would not have been issued but for the false representations made by the defend-

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ant and relied upon by the officers of the plaintiff. The plaintiff had no other information respecting the representations than that furnished by defendant, hence such information is conclusively shown to constitute the inducement for the issuance of the policy.

There is no evidence produced on the trial sufficient to overcome the positive evidence of the plaintiff to the effect that the answers and information in the application exerted a material influence upon the minds of the officers of the plaintiff so as to induce plaintiff to accept the risk and issue the policy. We are therefore of opinion that the answer of the jury to the nineteenth question was contrary to the undisputed evidence.

2. It is further insisted by counsel for respondent that the answer to the nineteenth question in any event was immaterial, therefore plaintiff was entitled to judgment upon the verdict regardless of this finding, and further that the representations constituted a warranty by insured, under sec. 1941—50, Stats., as it existed at the time the policy was issued (which section was afterwards repealed), breach of which would have defeated an action upon the policy, had the plaintiff not been bound by the knowledge of its agent as to the falsity thereof.

In view of the findings of the jury as amended by the court and supported by the evidence it is unnecessary to decide, and we do not decide, whether the nineteenth finding was immaterial or whether the representations made constituted a warranty by the insured.

It having been established by the evidence and findings that the representations were false—known by defendant so to be,—and that in issuing the policy plaintiff believed the false representations to be true and relied thereon in accepting and issuing the policy, and was justified in so doing, and that the answers to said questions and information in the application for insurance did exercise a material influence upon the minds of the officers of the plaintiff so as to induce

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it to accept the risk and issue the policy in question, and that plaintiff sustained damages in consequence of the false representations, a cause of action against the defendant was complete. *St. Paul F. & M. Ins. Co. v. Laubenstein,* 162 Wis. 165, 155 N. W. 918; *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406; *Woteshek v. Neuman,* 151 Wis. 365, 138 N. W. 1000; *Darlington v. J. L. Gates L. Co.* 151 Wis. 461, 138 N. W. 72, 139 N. W. 447; *First Nat. Bank v. Hackett,* 159 Wis. 113, 149 N. W. 703.

No error was committed in refusing to set aside the answer of the jury to the effect that defendant knew that insured did not own forty-one acres of land and knew that the same was not of the value of $600 to $800. There was ample evidence to support these findings.

3. Nor did the court err in refusing to find on the questions of good or bad faith of defendant. That issue was sufficiently covered by the questions submitted to the jury.

4. It is also contended that the court erred in restricting the right of the defendant in the examination of witnesses and unduly interfered with the right of defendant's counsel to cross-examine witnesses. We cannot see that there was any error under this head. The order in which witnesses shall be examined and cross-examined, the form of questions, and manner in which the trial of cases shall be conducted in the trial court are largely within the discretion of the court.

We fail to find any prejudicial error in the record.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on February 4, 1919.

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WILLIAMS, Appellant, vs. TRAVELERS INSURANCE COMPANY, Respondent.

November 11, 1918—February 4, 1919.

Accident insurance: Statutory regulation of contract: Typography of policy: Invalidity of provision therein: Approval of policy form by insurance commissioner: Collateral attack.

1. When a statute declares, as the public policy of the state, that contracts relating to a particular subject (in this case insurance against accidents) shall be in certain prescribed forms and with specific conditions concerning the respective rights and duties of the parties, such statute is controlling as against any contract the parties may attempt to make varying therefrom.
2. Where an accident insurance company issued a policy which did not comply with the requirements of clause (6), sub. 2, sec. 1960, Stats., that any portion of the policy "which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold-face type and with greater prominence than any other portion of the text of the policy," no such reduction of the indemnity can be made by the company under a provision of the policy not printed as above stated. The provision not printed as prescribed, although it is a standard provision in the form found under clause (B):—1 of sub. 3 (1), sec. 1960, is, under sub. 9, sec. 1960, to be treated as though it were not in the policy at all.
3. Where failure in such a case to comply with the statutory requirement appears, without doubt or question, from the policy itself, the fact that the policy form had been approved by the insurance commissioner does not preclude an attack upon it and upon such decision of the commissioner, in an action upon the policy by a beneficiary. *Lundberg v. Interstate B. M. A. Asso.* 162 Wis. 474, limited.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The defendant insurance company issued its "Special Accumulative Accident Policy," form ED 9229, to the plaintiff April 14, 1915, describing him in such policy as being under a preferred classification and by occupation "buying and

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selling of real estate, office duties and traveling only," and providing, in case of total disability, for a weekly indemnity of $25. The policy was renewed at the expiration of the first year and was in force October 5, 1916, the time of the injury.

The plaintiff lived in the city of Madison and had an office at Cameron, Wisconsin. He was engaged in selling lands in that neighborhood. On October 4th he came with a man named Quinn, whom he had theretofore engaged for that purpose, to clear a certain tract of land belonging to plaintiff's wife and which he then contemplated selling. The clearing was to be done by the use of dynamite, and a quantity of it for that purpose was taken by plaintiff and Quinn to the land, a short distance away from the store where the dynamite was purchased, on the morning of that day. During the day plaintiff was about the land where Quinn was working a portion of the time, but he did not use or assist in using any of the dynamite. He spent his time in piling up and setting fire to some of the stumps that had been exploded by Quinn. The plaintiff contemplated leaving early the following morning, but on missing the train found it necessary to spend the following day, October 5th, at the same place. In the forenoon of the 5th he carried about twelve and one-half pounds of dynamite from the store a mile or so distant to the place where Quinn was working on the land, and for Quinn's use. During the forenoon plaintiff used two small pieces of dynamite, about one fourth of a pound each, in exploding under the extended roots of some stumps with a view of seeing, as he testified, if in that manner the work could not be done more economically than in the manner in which it was being done by Quinn. He became satisfied, after two such experiments, that there was no advantage in the method that had so appealed to him. Later in the forenoon Quinn went to the store to obtain an additional quantity of dynamite. During his absence plaintiff saw a stump so situated that he thought of trying one

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more experiment upon it with a half stick of dynamite, by packing the same under the roots with clay and then exploding it. Several futile efforts were made by him to explode it after it had been so packed, and then in some manner there was an explosion, the result of which was such injury to his eye and ear that no question was raised by defendant but that there was a total disability therefrom such as would meet the language of the total disability clause in the policy entitling him to $25 per week, unless the amount must be lessened under the other conditions of the policy.

In November, 1910, defendant filed with the insurance commissioner a solicitor's accident manual dated in February, 1909, and several small supplements to it were filed at various times thereafter. The manual contained a provision in substance that if an insured was injured in an occupation classified as more hazardous than that specified in the policy the insurance would not be forfeited, but would be reduced to such an amount as the premium paid would have purchased under the rates for such increased hazard. In a long table therein, under the heading "Classification of Risks," were the following: "Dynamite maker, handler, user, or custodian of—Extra special hazardous, limit of risk $500." Also, "Real-estate agent or broker, buying and selling timber lands, ordinary, limit of risk $3,000;" "Real-estate agent or broker, preferred, limit of risk $5,000."

On December 19, 1913, a form of the policy in suit here, together with nine other different forms, were sent by defendant to the insurance commissioner for approval and they were approved on the same date. The letter of approval from the commissioner as to this particular form, after describing it, says as follows: "Is approved for use after January 1, 1914, until otherwise ordered."

In February, 1914, the insurance commissioner, writing his approval of another form of defendant's policy, said as follows: "Permit me to observe that I think the first paragraph of the first of the standard provisions should be

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printed in bold-face type so there may be no question but that it conforms with subdivision (6), subsection (2), section 1960, Wisconsin Statutes (standard provisions law)." And again in the following month, in writing as to another such form of policy, the commissioner calls the defendant's attention to the fact that he had heretofore suggested the printing of the first of the standard provisions in bold-face type, adding, "I do not assert that it is necessary that this paragraph be printed in bold-face type; I merely suggest that the failure so to print it can result in loss only to the company."

A jury was waived and there was a trial by the court, which made its findings. The ones material for consideration here are as follows:

"2. That prior to the issuance of said policy the commissioner of insurance of Wisconsin had approved the form of policy so issued and the defendant company had filed with said commissioner its classification of risks as required by section 1960 of the Statutes of Wisconsin.

"3. That plaintiff was subsequently injured by the discharge of dynamite while he was using such dynamite to remove stumps from land owned by his wife; that when so injured plaintiff was doing an act or thing pertaining to an occupation classified by the insurer as more hazardous than that of buying and selling real estate."

The defendant requested the court to make findings providing in substance that the plaintiff was not injured while performing ordinary duties about his residence nor while engaged in recreation; and that when injured he was doing an act or thing pertaining to the occupation classified by defendant as "Dynamite maker, handler, user, or custodian of," and that the premium paid would have purchased but one sixth of the indemnities and benefits under the occupation first above mentioned. The trial court ruled upon such proposed finding as follows: "Refused as immaterial, because each of the requests is established by the evidence without dispute."

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The court directed judgment for the sum of $223.81, being one sixth of the amount to which plaintiff would have been entitled if under the rate of $25 per week. From the judgment entered thereupon plaintiff appeals.

For the appellant there was a brief by *Riley & Ohm* of Madison, and oral argument by *M. C. Riley* and *H. F. Ohm.*

For the respondent there was a brief by *Olin, Butler, Stebbins & Stroud* of Madison, and oral argument by *B. H. Stebbins* and by *W. A. Foley* of Milwaukee.

The following opinion was filed December 3, 1918:

ESCHWEILER, J. By ch. 601, Laws 1913, what is now sec. 1960, Stats., providing for a standard accident and health policy, was adopted. This statute is the same in form and substance as was recommended by the National Association of Insurance Commissioners of this country in the same year and was adopted in almost the identical form in New York, Connecticut, Minnesota, New Hampshire, North Carolina, and Pennsylvania in 1913, and by Illinois in 1915. . . Portions of the statute are as follows:

"Section 1960. 1. On and after the first day of January, 1914, no policy of insurance against loss or damage from the sickness, or the bodily injury or death of the insured by accident shall be issued or delivered to any person in this state until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with the commissioner of insurance; nor shall it be so issued or delivered until the expiration of thirty days after it has been so filed unless the said commissioner shall sooner give his written approval thereto. If the said commissioner shall notify, in writing, the company, corporation, association, society or other insurer which has filed such form that it does not comply with the requirements of law, specifying the reasons for his opinion, it shall be unlawful thereafter for any such insurer to issue any policy in such form.

"2. No such policy shall be issued or delivered . . . (6) unless the exceptions of the policy be printed with the same prominence as the benefits to which they apply, pro-

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vided, however, that any portion of said policy *which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold-face type and with greater prominence than any other portion of the text of the policy*" (italics ours).

"3. Every such policy so issued shall contain certain standard provisions, which shall be in the words and in the order hereinafter set forth and be preceded in every policy by the caption 'Standard Provisions.' . . ."

"(1) A standard provision relative to the contract which may be in either of the following two forms: Form (A) to be used in policies which do not provide for reduction of indemnity on account of change of occupation, and Form (B) to be used in policies which do so provide."

In the same subsection, after provisions as to what must appear in Form (A), appears in a clause relative to Form (B) (being the form in question in suit) the following so-called standard provision, which appears also verbatim under the heading "Standard Provisions" on the second page of the policy and reads as follows:

"1. This policy includes the indorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the insurer's classification of risks and premium rates in the event that the insured is injured after having changed his occupation to one classified by the insurer as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the insurer will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the insurer for such more hazardous occupation."

Sub. 13, sec. 1960, provides a penalty by way of fine or the revocation of the license of any company, officer, or agent thereof who issues or delivers in this state any policy in wilful violation of the provisions of the act.

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When the legislature declares, as it has by this section in question, the public policy of the state to be that that which had theretofore been subject to contract between the parties shall hereafter be by certain prescribed forms and with specific conditions concerning the respective rights and duties of the parties thereto, the statutory provisions step in and control and regulate the mutual rights and obligations rather than the provisions of any contract the parties may attempt to make varying therefrom. *Temple v. Niagara F. Ins. Co.* 109 Wis. 372, 85 N. W. 361; *Keith v. Royal Ins. Co.* 117 Wis. 531, 94 N. W. 295; *Whitfield v. Ætna L. Ins. Co.* 205 U. S. 489, 27 Sup. Ct. 578; *Verducci v. Casualty Co.* 96 Ohio St. 260, 117 N. E. 235.

The defendant seeks to reduce the amount it must pay for the injury from the primary rate of $25 per week by virtue of the clause of the standard provisions, found under clause (B):—(1) of sub. 3 (1), sec. 1960, which we have quoted, either because when injured plaintiff had changed his occupation to one more hazardous, or because when injured he was doing an act or thing pertaining to a more hazardous occupation than that under which he was classified by the policy, the latter being the one adopted by the trial court.

The policy in suit is before us in the record and shows upon its face, absolutely and without any room for question or debate, that the clause relied upon is not printed in bold-face type and is not printed with greater prominence than any other portion of the text of the policy. The provisions of clause (6), sub. 2, sec. 1960, above quoted and italicized, meet the exact condition confronting defendant in this case, where it now seeks, by virtue of the circumstances under which this injury occurred, to reduce the indemnity. Under and by virtue of that clause (6) the defendant was required to print the clause now relied upon by it in bold-face type and with greater prominence than any other portion of the text of the policy, because that portion of the policy so relied upon purports, by reason of the circumstances under

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which a loss is incurred, to reduce the indemnity promised under ordinary circumstances.

In presenting this partial defense by way of reduction from the stipulated indemnity defendant must rely upon the policy it issued. That document, when produced and examined, shows for itself that the defendant has, in issuing the same, violated the express provision of the law as to the manner and form in which such a defensive clause shall be printed. It thus appearing by its own document that it has, as to the clause in question, placed itself outside the pale of the law, it cannot, in a suit such as here, be permitted to take advantage of any such clause.

The defensive clause not appearing in the policy in manner and form as required by statute, it is as though it were not there at all. This, in our judgment, is the necessary and reasonable effect to be given sub. 9 of this sec. 1960, which reads as follows:

"9. A policy issued in violation of this act shall be held valid but shall be construed as provided in this act and when any provision in such policy is in conflict with any provision of this act the rights, duties and obligations of the insurer, the policy-holder and the beneficiary shall be governed by the provisions of this act."

If it does not so apply in such a situation as we have before us, then it seems superfluous. So applied, it gives life to the provisions of the statute which so evidently require that greater publicity be given in the policy to the clauses under which the insurer may expect to lessen its payments than to the provisions under which the insured may have hoped and believed his indemnity was fixed. It will undoubtedly emphasize the warning given on this very point by the insurance commissioner in his letters to defendant after the approval of the form of this policy and which letters are quoted from in the statement of facts above, and it may preserve these salutary provisions from lapsing into a state of innocuous desuetude.

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It is contended, however, by defendant that such a position ought not to be maintained, inasmuch as from the undisputed evidence and as found by the trial court this form of policy known as ED 9229 was approved by the commissioner of insurance December 19, 1913, and that such approval thereupon became absolute and made such form of policy immune from any collateral attack or question, as to whether or not there was a compliance with the statute, by any beneficiary or policy-holder in a suit for benefits claimed under such policy, and that such was the holding of this court in *Lundberg v. Interstate B. M. A. Asso.* 162 Wis. 474, 156 N. W. 482, and that by that decision such rule is *stare decisis*. Furthermore, that in any event this particular policy is to be read and construed as though the views expressed in that case were a part of the contract between the parties.

In the *Lundberg Case* the issues were submitted to the trial court upon stipulation and without the taking of testimony. In the stipulation the defendant contended that the policy there in question showed for itself that it was in typographical make-up in accordance with the same clause (6), sub. 2, above quoted and here involved, and that that was purely a question of law for the court. The trial court held by his finding that such question was determinable by an examination of the printed portions of the policy by the court and that the provision in question there was in accord with and met the provisions of the law. On the appeal this court concurred in that conclusion reached by the lower court by that finding (p. 480). In the *Lundberg Case,* therefore, the fact was determined by the court from an inspection of the policy itself that there was a compliance with the statute. In this case, and beyond doubt or question, the policy in suit shows for itself a fact exactly contrary to the fact found and shown by the policy itself in the *Lundberg Case.*

While the *Lundberg Case,* upon the facts there presented,

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was correctly decided, yet we are now constrained to hold that certain language there used to the effect (p. 479) that after approval by the commissioner of a form of policy presented to him under sec. 1960, then, in a suit like this upon the policy by a beneficiary, there cannot be a collateral attack permitted upon such approval, went too far and must be now deemed withdrawn.

The disposition we thus make of this case, in holding that defendant's failure to comply with the statute prevents it from asserting its partial defense, makes it unnecessary to pass upon the other points presented in the very able brief and argument of appellant's counsel.

The plaintiff is entitled to the full indemnity of $25 per week from the time of the accident to the commencement of this suit, and judgment to that effect should have been entered.

By the Court.—Judgment of the circuit court reversed, with directions to enter judgment in accordance herewith.

The following opinion was filed December 6, 1918:

WINSLOW, C. J. *(concurring).* I understand that it is held by the opinion of the court in this case, *first,* that where, as in the *Lundberg Case,* a question of fact is presented as to whether the policy in question conforms typographically to the requirements of the statute, the decision of the commissioner on that question is final and cannot be collaterally attacked; and, *second,* that where, as in the present case, there is no question of fact, but simply a plain violation of the command of the statute, the approval of the form by the commissioner does not help the form in the least, but it may be attacked in any court in which it comes in question for its failure to comply with the plain commands of the law.

The result is that (as applied to the facts then present) the rule stated in the *Lundberg Case* was right and is ap-

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proved, but that it should not be extended to a case like the present where there is no question of fact to be passed upon.

With this understanding of the effect of the present decision I concur in the reversal.

ROSENBERRY, J. I concur in the views of the Chief Justice.

A motion for a rehearing was denied, with $25 costs, on February 4, 1919.

BERGEVIN, by guardian, Respondent, vs. BERGEVIN, imp., Appellant.

January 7—February 4, 1919.

Contracts: Validity: Public policy: Agreement for a divorce: Division of property: Executory parts not enforceable: Foreclosure of mortgage.

An agreement between husband and wife, pending an action by the wife for a divorce, pursuant to which he conveyed his real and personal property to her and she paid him a certain sum in money and executed for his benefit two notes secured by mortgage on said real property, the sole consideration being that he would not make any contest in the divorce action and that upon such division of the property they would abandon marital relations, was void as against public policy, and as to executory parts thereof the courts will not grant relief. The husband, therefore, is not entitled to enforce the notes and mortgage given by the wife. ROSENBERRY and SIEBECKER, JJ., dissent.

APPEAL from a judgment of the circuit court for Chippewa county: JAMES WICKHAM, Circuit Judge. *Reversed.*

On October 10, 1911, the defendant *Annie Bergevin* commenced in the same circuit court an action for divorce against her then and now husband, the plaintiff herein, *Nels Bergevin*. In the complaint she charged her husband

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with cruel and inhuman conduct and excessive drinking. The usual application was made and notice thereof properly given for alimony and suit money, but such motion was never heard by the court and no further proceedings were had in the divorce action. Title to the farm upon which the parties had lived was then in the husband and he also owned some personal property. She had no separate property.

After the husband was in default in serving an answer and on November 14, 1911, an agreement was made between the parties after conferences with their respective attorneys. Under such agreement or understanding (it being uncertain from the testimony whether such agreement was reduced to writing) the husband deeded the farm to the wife subject to then existing mortgages and gave her a bill of sale for the personal property. She paid him $200 in cash and executed two notes for $400 each, secured by a mortgage on the property so conveyed, which mortgage he also signed; the notes being payable to the husband's then attorney, also named as mortgagee. That attorney subsequently assigned the notes and mortgage to the husband. Immediately upon the completion of the transaction the husband left that vicinity, going to Canada, Chicago, and elsewhere, and never afterward living with her or doing anything toward her support or that of the five children who remained with her living on the farm. He was subsequently adjudged insane, a guardian appointed for him, and this action commenced to foreclose the mortgage upon default in the payment of principal and interest on the two notes aforesaid.

It was alleged by way of defense that the notes and mortgage were executed and delivered pursuant to agreement and with the understanding that the parties thereto were thereafter to live separate and apart, and with the further provision that a decree of divorce should be obtained dissolving their marriage ties.

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There was no substantial dispute about this transaction. It appeared that the parties had had former troubles and one or both had previously consulted an attorney concerning them.

On the trial herein the husband testified that owing to the trouble that he and his wife had, he made up his mind he would not stay any longer. She was going to give him a divorce and he was going to give her the farm and she was going to allow him $1,000; that he never intended to live with her after that; that he expected to get a divorce and his attorney agreed to get it.

The wife testified that she and he simply agreed to live apart. He was to give her a divorce; that was the only consideration for the mortgage and notes.

The then attorney for the wife testified that all the property interests were to be finally settled between them by this agreement; that it was to be final when the divorce was granted; that after the husband left there seemed to have been a report that he was dead and no further proceedings in the divorce action were taken, and that later on it was ascertained that the husband had become insane; that his understanding of the agreement was that the husband was not going to fight the divorce action, although it was not so said in so many words.

The husband's attorney testified that his remembrance was that there was no agreement about the getting of the divorce; that the mortgage was made to him because the parties were husband and wife and the husband's signature was necessary on the real-estate mortgage; that the husband expected that the wife would get a divorce, but that he did not intend to appear or defend the action; that there was not any express agreement that she would prosecute a divorce action; that they were separated and had separated and that the husband was going away for good; that the husband said he was going away, and if he could get that much he agreed he would go away and be satisfied with a divi-

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sion of the property and did not seem interested in the divorce.

Findings of fact were made by the trial court reciting, among other things, as follows:

"That it was then expected by the parties that said divorce action would be prosecuted to final judgment; that it was the intention of the parties that said deed, bill of sale, notes, and mortgage should all be delivered and take effect at once without reference to whether or not such divorce should be thereafter granted, and no promise to obtain a divorce or for the separation of the parties constituted any part of the consideration in said notes and mortgage."

And as conclusions of law upon the facts found "that the plaintiff is entitled to judgment as demanded in the plaintiff's complaint."

From a judgment of foreclosure for the amount of the notes and interest and costs in favor of the plaintiff husband, the defendant wife has appealed.

The cause was submitted for the appellant on the brief of *Sturdevant & Farr* of Eau Claire, and for the respondent on that of *Dayton E. Cook* of Chippewa Falls.

ESCHWEILER, J. Upon this appeal, there being no substantial contradiction in the testimony of the various witnesses as to the substance of the agreement between the husband and wife at the time of the execution of the notes and mortgage in suit here, there is presented no issue of fact for review, but only the question as to whether or not, upon the undisputed facts, the court below arrived at the proper conclusion. *McMillen v. Strange,* 159 Wis. 271, 279, 150 N. W. 434.

We are satisfied from a consideration of this evidence that these parties, then husband and wife, made the disclosed disposition of the property and obligations upon the sole consideration that the husband would not make any contest in the divorce action, if it was to be further prosecuted, and that upon such division of property they would abandon the marital relations that had theretofore existed.

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The conveyances were made and obligations executed, and thereupon and therewith the husband did leave his family and continued thereafter to live away from wife and children and make no further provision for their support and care.

It was an agreement, for a consideration of money and property, to dissolve a relationship that the public policy of this state deems it for the best interests of the state as well as of the parties themselves shall continue to subsist unless and until it be lawfully dissolved in the manner prescribed by law and under proper judicial scrutiny and direction.

When, as here, an executory part of such a contract is sought to be enforced, this court has always denied relief. *Baum v. Baum,* 109 Wis. 47, 85 N. W. 122; *Anderson v. Anderson,* 122 Wis. 480, 100 N. W. 829; *Kistler v. Kistler,* 141 Wis. 491, 124 N. W. 1028. That the same public policy is pursued in other jurisdictions is seen in the case of *Wolkovisky v. Rapaport,* 216 Mass. 48, 102 N. E. 910; Ann. Cas. 1915A, 809 and cases cited.

The parties to a divorce action may during its pendency and under sec. 2360, Stats., stipulate for a division of their property or estate, for alimony, or for the support of children in case a divorce be granted or a marriage annulled. But by the same statute such a stipulation must be subject to the approval of the court. Such submission to and approval by the court and the incorporating it within the provisions of the decree of divorce are essential to give such agreements as here made validity and efficacy. That was not done here, and, failing that, the mere agreement of the parties will not be enforced. *Martin v. Martin,* 167 Wis. 255, 264, 167 N. W. 304, 307.

The notes and mortgage, therefore, upon which this action is brought, being parts of a transaction contrary to public policy, ought not to be and cannot be so recognized or approved that the plaintiff may have them enforced by the courts.

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By the Court.—Judgment reversed, and the cause remanded with directions to dismiss the complaint upon the merits.

ROSENBERRY, J. *(dissenting).* I am of the opinion that the finding of the trial court to the effect that the notes and mortgage in question were delivered to take effect at once, without reference to whether or not a divorce should thereafter be granted, is in accord with the clear preponderance and great weight of the evidence and not against it. All parties supposed that a divorce would thereafter be granted, not because it was a matter of contract, but because upon the undisputed facts the wife was entitled to a divorce, and I am of the opinion that the trial court was right in holding that no promise to obtain a divorce was any part of the consideration given for the notes and mortgages. Upon the facts as found by the trial court, the plaintiff here was entitled to the judgment which was given him, which in my opinion should be affirmed.

I am authorized to say that Mr. Justice SIEBECKER concurs in this dissenting opinion.

SCHOOL DISTRICT OF EAU CLAIRE, Respondent, vs. BLYSTONE, Trustee, and another, Appellants.

January 7—February 4, 1919.

Building contract: Default of contractor: Completion under new contract: Liability of surety for increased cost: Architects' certificate as to amount: Condition precedent: Waiver: Parties.

1. The contractor for the heating plant in a building, after partly installing the plant, became bankrupt and the trustee in bankruptcy did not elect to perform the contract. The surety on the contractor's bond, upon being notified of the default, declined to complete the contract but suggested that a new con-

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tract for completing the work be awarded to a certain furnace company. This was done without objection on the part of the original contractor, and the contract was completed by said furnace company at a fair price. The original contract provided that in case of such a default the expense incurred by the owner for finishing the work and any damage incurred through such default should be audited by the architects, whose certificate thereof should be conclusive. In view of the fact that such provision was mainly for the protection of the owner, it is *held,* in an action by the owner against the surety, that by its suggestion as to the completion of the work, upon which the owner acted, the surety waived the issuance of the architects' certificate as a condition precedent to recovery of the expense and damage.

2. Although the bond of the surety provided that in any action thereon the contractor should be made a party, it was a sufficient compliance therewith to make the contractor's trustee in bankruptcy a party, no objection to such procedure having been made either by answer or demurrer.

APPEAL from a judgment of the circuit court for Eau Claire county: E. C. HIGBEE, Judge. *Affirmed.*

Action on bond. The Eau Claire Cornice & Heating Company, hereinafter called the Company, was under contract with the plaintiff to furnish materials to complete a heating, ventilating, and humidity system for a certain building then in process of construction. The Company became bankrupt, the trustee did not elect to perform the contract, and the Company was in complete default. The *Maryland Casualty Company* was surety on the Company's bond, and after the Company's default the plaintiff notified the *Casualty Company* of the default and the *Casualty Company* declined to complete the contract. In the letter exercising its option not to complete the contract the *Casualty Company* said:

"We suggest that you award separate contract to the American Foundry and Furnace Company to complete referred to contract, as in our opinion they are prepared and willing so to do at correct figures."

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Pursuant to this suggestion and after having obtained some informal bids, the plaintiff entered into a contract with the American Foundry and Furnace Company for the completion of the original contract for the sum of $2,825. This action was brought to recover this amount less the amount remaining due to the Company on the original contract. Plaintiff had judgment for $1,147 with costs, from which judgment the defendants appeal. Other facts are stated in the opinion.

The cause was submitted for the appellant *Maryland Casualty Company* on the brief of *Sturdevant & Farr* of Eau Claire, and for the respondent on that of *J. C. Gilbertson* of Eau Claire.

ROSENBERRY, J. The *Casualty Company* in its answer alleged that the price paid for completing the contract was greatly in excess of a fair price, but the trial court upon ample evidence found the contrary. This was the only defense set up in the answer. But upon the trial it appeared that article 5 of the contract between the plaintiff and the Company contained a provision in the usual form that if the contractor should at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or materials of a proper quality, the owner might, after three days' written notice, provide such labor and materials and deduct the cost thereof from any moneys then due or thereafter to become due to the contractor under this contract. And it was further provided that, upon the architects' certifying that such refusal or neglect was sufficient ground for such action, the owner was also at liberty to terminate the employment of the contractor and complete the work. The last clause of the article was as follows:

"The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be

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audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

Upon the trial plaintiff failed to prove that it had procured the certificate required by article 5 of the contract, and the defendants claim that the procurement of said certificate was a condition precedent to the right of the plaintiff to maintain this action. The trial court held that the defendants had waived the provisions of the contract requiring that the architects certify the expense of completing the heating system; this is the main contention of the appellants here.

Waiving the question as to whether or not the bankruptcy of the Company and the election of the trustee not to perform the contract was such a breach as to wholly terminate it (9 Corp. Jur. 814 and cases cited), we think the trial court was clearly right in holding that under the facts and circumstances of the case the production of the architects' certificate in accordance with article 5 of the contract was waived.

After the default of the Company and its abandonment of the work there remained nothing to do but to fix the damages, so far as the *Casualty Company* was concerned, it having elected not to complete the work itself. The plaintiff was under no obligation to complete the contract. In this situation the *Casualty Company* suggested that the completion of the work be let by contract to the American Foundry and Furnace Company, which was prepared to do the work at a reasonable figure. Acting upon this suggestion the plaintiff entered into a contract for the completion of the work. The claim of the defendants that the contract price was excessive has been negatived by the trial court, and it is therefore established as a fact in the case that the contract price was fair and reasonable. Under such circumstances, what was there left for the architects to certify to?

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It further appears that the work of completing the contract was done mainly by the proprietors of the Company without any objection or protest on their part. In determining whether or not there was a waiver, the fact that a provision of this kind was inserted mainly for the protection of the owner must be considered. 9 Corp. Jur. 760, § 99 and cases cited. Of course the contract in this respect binds both parties, but a waiver on the part of the contractor and his representatives may be inferred from less significant circumstances than waiver on the part of the owner for whose benefit mainly the clause is inserted.

The owner is held to waive such a provision in his favor where both parties ignore a provision for architects' certificates. *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 81 N. W. 136. Here, at the suggestion of the *Casualty Company,* without any objection on the part of the Company, the plaintiff entered into an arrangement which made the issuance of an architect's certificate nothing but a useless formality, and the trial court rightly held that the issuance of the architects' certificate was waived.

It is further argued that the Company was not sued in this action and that the bond upon which the action was brought provides that the principal of the bond shall be made a party to any suit or action. The Company was a bankrupt. By leave of court first obtained the trustee was made a party defendant. No objection to this procedure was made, either by answer or demurrer. The claim of the plaintiff was provable against the trustee in bankruptcy, and upon payment of the claim the *Casualty Company* will be subrogated to plaintiff's rights in that respect. As against the trustee, the amount of the claim is adjudicated in this action. We think this is a sufficient compliance with the bond.

By the Court.—Judgment affirmed.

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MULVANEY, Appellant, vs. TOWN OF ARMSTRONG, Respondent.

January 7—February 4, 1919.

Towns: Duties of clerk: Power of town board to employ another person to make out tax roll: Reassessment.

1. A town is a mere *quasi*-corporation, possessing only such powers and functions and subject only to such liabilities as are provided by statute. It must function in the manner prescribed by the legislature, and courts can sanction no other.
2. It is the duty of the town clerk to make out the tax roll of the town; and prior to the enactment of sec. 1084*a*, Stats. (ch. 274, Laws 1917), a town board had no authority to employ another person to perform that duty, even though, by reason of orders of the tax commission requiring reassessments of the property of the town for previous years, the work of making out the roll became so complicated and difficult that neither the clerk nor any other qualified elector of the town was capable of doing it in the manner required by sec. 1087—57, Stats.

APPEAL from an order of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

This action was brought to recover $2,171.69 from the town of *Armstrong* for making out the tax roll of said town for the year 1915, containing debits and credits, made necessary by two reassessments of the property of said town under the provisions of secs. 1087—45 to 1087—56, Stats.; the claim being based upon an alleged employment to do such work by the town board of said town. A demurrer to the complaint was sustained, and this appeal was taken from the order sustaining the demurrer. Essential portions of the complaint are referred to in the opinion.

For the appellant there was a brief by *Eberlein & Larson* of Shawano, and oral argument by *Albert S. Larson.*

For the respondent there was a brief by *Greene, Fairchild, North, Parker & McGillan* of Green Bay, attorneys, and *George G. Greene* and *Jerome R. North,* of counsel, and oral argument by *Mr. North.*

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OWEN, J. By secs. 1087—45 to 1087—56, Stats., the state tax commission is authorized to make a reassessment of the property in any assessment district whenever it shall satisfactorily appear that the assessment of property in such assessment district is not in compliance with law and the interest of the public will be promoted by a reassessment of such property. By sec. 1087—51 it is provided that the "reassessment roll when completed shall be filed in the office of the clerk of such district and shall take the place of the original assessment made in such district for said year for all purposes and shall be *prima facie* evidence of the facts therein stated and of the regularity of all the proceedings culminating therein."

If, however, such reassessment shall not have been completed in time to take the place of the original assessment so as to form the basis for the computation of taxes for that year, then by sec. 1087—57 it is provided that

"the clerk of the district shall levy and apportion the taxes for that year upon the basis of the original assessment roll, and when the reassessment is completed the inequalities in the taxes levied under the original assessment shall be remedied and compensated in the levy and apportionment of taxes in such district next following the completion of said reassessment in the following manner: Each tract of real estate, and, as to personal property, each taxpayer, whose tax shall be determined by such reassessment to have been relatively too high, shall be credited a sum equal to the amount of taxes charged on the original assessment in excess of the amount which would have been charged had such reassessment been made in time; and each tract of real estate, and, as to personal property, each taxpayer, whose tax shall be determined by such reassessment to have been relatively too low, shall be charged, in addition to all other taxes, a sum equal to the difference between the amount of taxes charged upon such unequal original assessment and the amount which would have been charged had such reassessment been made in time."

It appears from plaintiff's complaint that on the 25th day of May, 1914, the state tax commission made an order re-

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quiring a reassessment of all the taxable property of the town of *Armstrong* for the year 1913; that on the 5th day of January, 1915, and before the order of May 25, 1914, had been complied with, the state tax commission made a further order requiring a reassessment of all the taxable property in said town for the year 1914. Thus proceedings for the reassessment of the town for the years 1913 and 1914 were concurrently pending. By September, 1915, such reassessment proceedings had either been completed or were so near completion that the matter of making out the tax roll for 1915, which should contain debits and credits as required by sec. 1087—57 to equalize taxes paid based on the unlawful assessments for the years 1913 and 1914, gave concern to the town clerk. The complaint states:

"That the town clerk and town officers of said town were inexperienced in said work and were incompetent and unable to perform the same; that affiant is informed and verily believes that it was impossible to procure the services of any qualified elector of said town as town clerk competent to perform said work and able to complete the same within the time required by law; that the town clerk of the defendant town informed the defendant's town board of his inability and want of capacity to perform said work, and having failed and neglected to cause said work to be performed it became and was absolutely necessary for said town and its officers to employ some one experienced in said work to perform the same, in order to carry out the orders of said tax commission and to prevent the town from being involved in prolonged and expensive litigation. That on or about the 15th day of August, 1915, the said defendant, the town of *Armstrong,* acting through its duly elected and constituted town board and upon the advice of V. J. O'Kelliher, its duly employed attorney in said matter, and at a duly held meeting of said board, employed said plaintiff to perform said services. Pursuant thereto the plaintiff did, with the aid of two assistants, perform said services, and was employed in the performance thereof from the 1st day of September, 1915, to the 23d day of March, 1916, and in

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the performance of said services was obliged to and did expend the sum of $21.69."

The services rendered by plaintiff pursuant to such alleged employment form the basis of this action. The case is ruled by *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798. In that case it was held that where a county had a duly qualified and acting district attorney the board of supervisors had no authority to employ another attorney to take charge of and conduct in the circuit court for that county tax litigation in which the county was interested, as it was the legal duty of the district attorney to defend all such actions or proceedings. It was there said:

"Counties are, at most, but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. . . . They are purely auxiliaries of the state; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject. Considered with respect to the limited number of their corporate powers, the bodies above named rank low down in the scale or grade of corporate existence, and hence have been frequently termed '*quasi*-corporations.'"

The same is true of towns. They are *quasi*-corporations. *Norton v. Peck,* 3 Wis. 714; *Eaton v. Manitowoc Co.* 44 Wis. 489; *Miller v. Jacobs,* 70 Wis. 122, 35 N. W. 324. "A town as well as a county possesses only such powers and functions and is subject only to such liabilities as are provided by statute." 38 Cyc. 599.

It was the duty of the town clerk to make out the tax roll for the year 1915. He took his office *cum onere.* Even though the ordinary duties of the office became more ardu-

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ous and exacting, it was nevertheless his duty to perform them. Whether the town had power to grant him additional compensation for extraordinary duties is not before us, for the reason that no attempt to that end was made. The plaintiff here is an entire stranger to the town, not even being a resident thereof. He bases his right to recover upon the alleged contract entered into with the town board. If the town is bound by that contract, statutory authority to enable the town board to bind the town must have existed. Concededly there was no such express authority. The passage of ch. 274, Laws 1917, creating sec. 1084*a*, Stats., authorizing the town board to employ additional clerical help in preparing the tax rolls under such circumstances, amounts to a legislative assertion of that fact. Appellant's attorneys contend that authority is implied from the statutes providing for the reassessment. Such is not the case. They contain no suggestion that the making of the tax roll is to be taken from the hands of the town clerk in cases of reassessment made thereunder, nor that the town board is charged with any duty or clothed with any authority to meddle or interfere with its preparation.

The effect of the closing sentence of sec. 1087—57, providing that "the tax commission, any of its members, or its authorized agent, shall at any time have access to all assessment and tax rolls herein referred to for the purpose of assisting the local clerk and in order that the results of the reassessment may be carried into effect," need not be considered, as, obviously, it has no bearing upon appellant's right to recover in this action.

Appellant places considerable stress upon the fact alleged in the complaint that there was no one in the town competent to make the tax roll under the circumstances. That amounts to an assertion that the people of that town are not capable of local self-government. This raises a nonjudicial issue—one that courts cannot entertain. They are powerless to grant relief even though the allegation be found true. They cannot dissolve the town, change the scheme of

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government thereof, nor enlarge or limit its powers. It must function in the manner prescribed by the legislature, and courts can sanction no other.

By the Court.—Order affirmed.

LINGELBACH, Respondent, vs. LUCKENBACH and others, Appellants. [Three cases.]

January 7—February 4, 1919.

Statute of frauds: Oral contract by selling agent to repurchase corporate stock: Contract of indemnity: False representations: Laches.

1. Where an officer of a corporation, acting as its agent, sold stock therein and received a commission on the sales, and at the same time orally agreed that if the purchasers became dissatisfied or if the statements made by him should be found to be untrue he would individually purchase the stock from them at the price they paid therefor, such oral contract was valid as a contract of indemnity and was not within the statute of frauds.
2. In actions by the purchasers against such agent for breach of the contract to repurchase, brought within a reasonable time after they discovered the falsity of his statements and after they became dissatisfied, a recovery is *held* not to be barred by laches, although the implicit confidence which plaintiffs had in defendant had lulled them into security and the belief that his statements were true and had prevented as speedy and thorough an investigation as would otherwise have been made.
3. Time alone is not the essence of laches, but every case must be determined on its own facts.

APPEALS from judgments of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

These are appeals from three separate judgments. The actions were commenced separately and tried together and three separate judgments entered. The original complaint of *Minnie Lingelbach* sets forth false and fraudulent representations relied upon by the plaintiff respecting stock which

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the defendant had for sale in a corporation known as the Home Stores Company. The complaint was amended by adding the following:

"That if the said defendant *A. H. Luckenbach* could procure any of the shares of the capital stock for plaintiff that he would be glad at any time to repurchase the same from her for the same price that she would pay therefor."

The complaints of *Charles Lingelbach* and *Sigmund Lingelbach* were substantially the same in all material respects as the amended complaint of *Minnie Lingelbach.* The complaints also contained an allegation that the defendant *A. H. Luckenbach* had organized a corporation known as the *Luckenbach Realty Company* to which he transferred his property to defraud his creditors.

The answer interposed by each defendant denies generally the allegations of the complaints except as to the incorporation of the Home Stores Company and the *Luckenbach Realty Company,* and also admits the relationship of the parties.

The actions were tried by the court, findings of fact and conclusions of law made, and judgment ordered for each plaintiff separately. The court found that all the representations concerning the stock of the Home Stores Company were false and known by the defendant *A. H. Luckenbach* to be false, and were relied upon by plaintiff; that at the time of the sale of stock to the plaintiffs said *A. H. Luckenbach* individually and for a valuable consideration contracted with the plaintiffs to purchase the shares of the capital stock from plaintiffs at the price they had paid therefor, if the plaintiffs became dissatisfied with the purchase, or if the statements made by said *A. H. Luckenbach* should be found to be untrue; that the defendants *A. H. Luckenbach* and *Katherine S. Luckenbach* caused the incorporation of the *Luckenbach Realty Company,* one of the defendants, and transferred certain real estate owned by *A. H. Luckenbach* to said company, which transfer was made in fraud of the rights of the

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plaintiffs; that the plaintiffs on or about the 14th day of July, 1915, became dissatisfied with the purchase of said stock and aware of the falsity of said statements and tendered to said *A. H. Luckenbach* the shares of stock and demanded payment of the amounts paid therefor, and deposited the stock with the court in pursuance of said tender, and that plaintiffs brought action within a reasonable time after the discovery by them that the statements made by the defendant *A. H. Luckenbach* were false.

As conclusions of law the court found that the defendant *A. H. Luckenbach* was indebted to the plaintiffs in the respective sums paid for the stock, with interest, and that execution might be had against the real estate held by the *Luckenbach Realty Company,* and that upon payment of the judgments the clerk of the court deliver to said *A. H. Luckenbach* said shares of stock, and ordered judgment directing that said *A. H. Luckenbach, Katherine S. Luckenbach,* and the *Luckenbach Realty Company,* its officers and agents, be enjoined from selling, conveying, incumbering, or disposing of its real estate. Judgment was entered accordingly.

Counsel for defendants requested several findings, which were refused, and filed exceptions to the refusal to give the findings as requested, and also filed exceptions to the findings made.

For the appellants there was a brief by *John B. Chase* and *Classon & Whitcomb* of Oconto, attorneys, and separate briefs by *S. D. Hastings* of Green Bay, of counsel; and the cause was argued orally by *Mr. A. V. Classon* and *Mr. Chase.*

For the respondents there was a brief by *Bohmrich & Gabel* of Milwaukee, and oral argument by *Louis G. Bohmrich.*

KERWIN, J. The theory of the respondents is that they were induced to purchase the stock in the Home Stores

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Company upon the false and fraudulent representations of the defendant *A. H. Luckenbach* to the effect that the stock was of great value and was, in fact, of higher market value than its face; that the merchandise sold by said company was sold at a profit of 100 per cent.; that the investment in the stock was an excellent undertaking which had never paid less than ten per cent. dividends; that said *A. H. Luckenbach* had invested a large amount of cash in said stock; that he was not personally interested in the sale of the stock; that the Home Stores Company was in excellent financial condition; that several parties, naming them, had invested large amounts in the stock; that defendant *A. H. Luckenbach* would repurchase the shares of capital stock from plaintiffs at the price they had paid therefor if they became dissatisfied with the purchase or if the statements made by *A. H. Luckenbach* to plaintiffs should be found to be untrue. The representations were found by the court below to be untrue, and further that the defendant *A. H. Luckenbach* had refused to repurchase the stock although it had been tendered back and due demand made by the plaintiffs.

1. Point is made by appellants that there was an election of remedies by plaintiffs in their original complaints and amended complaints to proceed for rescission of the contract, and that, the plaintiffs having elected to rescind, they are bound by such election, and the court was therefore precluded from rendering judgment for damages. The record does not support this contention. The pleadings and notice served by plaintiffs before action was brought fully support the judgment entered, and show that the recovery sought by plaintiffs was the money paid by them in pursuance of the promise made by the defendant *A. H. Luckenbach* to take the stock off their hands at any time they became dissatisfied with it.

2. It is contended that the findings are not supported by the evidence and that the court should have made the findings requested by appellants. We are satisfied that the find-

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ings made fully cover the issues raised in the case and that no error was committed in refusing to make the findings requested. We are also convinced that the findings made are supported by the evidence. It appears from the evidence that for many years prior to the time of the sale of the stock in question the plaintiffs and defendants *A. H. Luckenbach* and *Katherine S. Luckenbach* were close, intimate friends, and that each had implicit confidence in the honesty and integrity of the other; and it is quite clear from the record that the plaintiffs relied with confidence upon all the statements and representations made by the defendant *A. H. Luckenbach,* and that the representations were false.

3. It is further contended by appellants that plaintiffs were guilty of laches, which bars recovery in this action. It is doubtless true that the implicit confidence which the plaintiffs had in defendants lulled them into security and the belief that the statements of *Luckenbach* were true and prevented as speedy and thorough investigation of the situation as would otherwise have obtained had no such confidence been reposed. The court below found that the actions were brought within a reasonable time after discovery by plaintiffs that the statements made to them by defendant *A. H. Luckenbach* were false and after they became dissatisfied.

As stated by appellants in their brief, "time alone is not the essence of laches, but every case must be determined on its facts." *Foote v. Harrison,* 137 Wis. 588, 119 N. W. 291. There is no fixed time necessary to bar a suitor in a court of equity. *Likens v. Likens,* 136 Wis. 321, 117 N. W. 799; *Bur v. Bong,* 159 Wis. 498, 150 N. W. 431. We are satisfied that the findings of the court below under this head cannot be disturbed.

4. It is also contended that the agreement to repurchase the stock is void because not in writing. This question is discussed by the court below in an opinion in the record, and also by Hon. S. D. Hastings, of counsel for appellants. This

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question is not free from difficulty. Counsel for appellants rely upon cases in this court and some in other jurisdictions. We are of opinion, however, that the point must be resolved in favor of the respondents upon the authority of cases in this court. Upon the established facts in this case *A. H. Luckenbach,* vice-president of the Home Stores Company, sold to the respondents shares of stock of the Home Stores Company and received a commission upon said sales, and as a part of said contract of sale agreed to repay the purchase price upon return of the stock.

We think the instant case is ruled by *Hull v. Brown,* 35 Wis. 652, upon the doctrine that the contract between the agent and the buyer is in the nature of a contract of indemnity, which is neither a contract for the sale of goods, wares, and merchandise, nor a contract to answer for the debt, default, or miscarriage of another, hence not within the statute of frauds. The facts in the case of *Hull v. Brown, supra,* are quite similar to the facts in the instant case. Brown as the paid agent, upon a commission basis, of Gunnison & Sherman, by written agreement sold a mower to Hull. As an inducement to Hull to make the contract Brown individually promised orally that if upon trial the machine was not satisfactory he might return it, and Brown was then to return the note, pay it himself, or reimburse or pay back to Hull the amount Hull had paid. Point was made that the contract was within the statute of frauds and could not be proved by oral evidence. This court said in speaking of the agreement:

"It was in the nature of a contract of indemnity, a promise to the plaintiff to return his note if the machine did not work to his satisfaction, or relieve and save him harmless from the payment of it himself. . . . It was, as we have said before, an original undertaking, made upon a valuable consideration and to subserve the business or pecuniary purposes of the defendant."

Other Wisconsin cases do not seem to be out of harmony with the above doctrine. In *Vohland v. Gelhaar,* 136 Wis.

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75, 116 N. W. 869, the plaintiff brought action to enforce an oral agreement by which the defendant promised to repurchase from the plaintiff shares of mining stock. At the time of making the agreement 600 shares of stock were sold by defendant to plaintiff for fifty cents per share. The defendant claimed that the contract to repurchase was void because within the statute of frauds. This court said:

"If the agreement to sell and the promise to repurchase are parts of the same transaction there is but one entire contract, for which the consideration was paid and under which the property was delivered, and consequently the statute of frauds has no application. . . . The agreement to purchase the stock by the plaintiff upon the consideration stated, and the promise to take back the stock at an advanced price, being parts of an original and entire contract, constituted a conditional sale, and the delivery of the shares and the payment of the purchase price satisfied the statute of frauds, and the plaintiff is entitled to recover the amount agreed to be paid by the defendant upon a return of the stock."

To the same effect is *Hankwitz v. Barrett,* 143 Wis. 639, 128 N. W. 430. In *Cooper v. Huerth,* 156 Wis. 346, 146 N. W. 485, the defendants as paid agents of a corporation sold an automobile to the plaintiff pursuant to a written contract, and at the time of sale defendants orally agreed that if the machine was not satisfactory it was to be returned and the notes given in payment thereof returned. This court said:

"That it was perfectly competent for defendants, though acting as agents, to bind themselves by a contract entirely outside the scope of their agency, and for the purpose of promoting their business as agents, there can be no doubt. *Hull v. Brown,* 35 Wis. 652. The evidence tended to show that such a contract was made. The jury intended to find that such a contract was made. . . . It follows that judgment should have been awarded to plaintiff on the verdict."

Korrer v. Madden, 152 Wis. 646, 140 N. W. 325, is relied upon by appellants, but the controlling question in the

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case at bar was not decided in that case. There the plaintiff purchased directly from the Church Furnishing Company, and at the same time the defendant, who was not an agent or officer of said company, made an entirely gratuitous oral statement to the plaintiff that if she ever became dissatisfied with any of the stock purchased from the company he would repurchase the same from her. The court said:

". . . It is unnecessary to consider whether, if defendant had acted as the agent of the corporation in making the sale, and as part of the contract had entered into an individual agreement to repurchase the stock, such individual promise would be within the statute of frauds."

See, also, *Trenholm v. Kloepper,* 88 Neb. 236, 129 N. W. 436, and *Clement v. Rowe,* 33 S. Dak. 499, 146 N. W. 700. In the latter case the defendant as agent of a corporation orally agreed with plaintiff that if he would convey certain land owned by him to said company in payment for preferred stock and the company should fail to pay annually a seven per cent. dividend on said stock, the defendant would, upon the surrender of such stock, pay to plaintiff $16,000. The court said:

"It is manifest from an inspection of the complaint that the facts in this case do not bring the oral contract sued upon within the provisions of sub. 4 of said section, and consequently the appellant's third contention is unavailing. . . .

"But if it be considered that Rowe, as secretary of the medicine company, was acting for the company in making the sale of the shares of stock, nevertheless the promise to repurchase was his own promise. In this view, which is the one most favorable to the defendant, the promise to repurchase would partake of the nature of an oral contract of indemnity. Such a contract is almost universally held to be essentially an original contract."

We are of opinion that the agreement of the defendant to repurchase the stock was not void because not in writing, but

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was valid as a contract of indemnity, and that the judgments below should be affirmed.

By the Court.—The judgments are affirmed.

UNITYPE COMPANY, Appellant, vs. SCHWITTAY, Respondent.

January 7—February 4, 1919.

Foreign corporation not licensed in this state: Interstate commerce: Conditional sale: Substitution of new contract: Validity.

1. A foreign corporation, not licensed to do business in Wisconsin, sold and delivered a unitype machine to a resident of this state under a conditional sale contract by the terms of which title was to be retained by the seller until the purchase price, for which notes were given, was fully paid. The purchaser died before the notes were all paid, and his widow continued his business and the use of the machine. Afterwards she and the seller entered into a new conditional sale contract with somewhat different terms, and she gave new notes, the old agreement being released and the unpaid notes of the deceased surrendered. *Held* that, the title to the machine never having passed and the substitution of the new contract being an ordinary incident of commerce, the interstate character of the whole transaction was not destroyed; and the notes given by the widow were valid and enforceable. *Sprout, Waldron & Co. v. Amery M. Co.* 162 Wis. 279, distinguished.
2. The facts that at the time of making the new contract the seller made a reduction in the balance due and that it then placed a new attachment on the machine did not alter the character of the transaction as an interstate sale.

APPEAL from a judgment of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Reversed.*

The plaintiff, a foreign corporation, which had never complied with the provisions of sec. 1770*b*, Stats., by filing a copy of its articles of incorporation with the secretary of state and therefore never had been licensed to do business in this state, and whose home office was in Brooklyn, New

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York, sold in June, 1911, to one Albert E. Schwittay of Marinette, Wisconsin, a certain unitype machine, together with type material, all of which was shipped from New York and delivered at the city of Marinette. It was done under a conditional sale contract properly filed with the city clerk, by the terms of which the title to the unitype machine and the material was to remain in the plaintiff until the entire purchase price of $1,500 should be fully paid. The machine was set up by said Schwittay and used in the printing office conducted by him at Marinette. Schwittay made payments on account of the purchase price upon notes having been made by him for that purpose in sums of $28 per month in reduction of the principal sum and interest. He died January 19, 1913.

His widow, *Gertrude Schwittay,* the defendant and respondent herein, was duly appointed administratrix of the estate of her deceased husband by the county court, and September 1, 1913, was fixed as the last day to file claims. Plaintiff was notified by correspondence with the defendant of such proceedings and as to such time for filing claims but filed no claim. The printing business conducted by the husband was continued after his death by the defendant both before and after the settlement of the estate and the machine remained in the same place of business and was used during all that time as it had been before.

Between August, 1913, and December 13, 1913, negotiations were had between the plaintiff and defendant with reference to this machine. About December 13th it was agreed by plaintiff's agent, then at Marinette, and defendant that the plaintiff would reduce the balance still due on the purchase price of $1,153.12 to $1,000 and would place a new attachment, valued at about $50, upon the machine and would clean the same, and that the defendant would then pay the $1,000 by notes of $20 each, monthly thereafter, and that a new conditional sale contract should be made; and with the further understanding that the un-

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paid notes of the deceased should be surrendered and the old conditional sale contract canceled. A written proposition to this effect, which omitted, however, any reference to the placing of the new attachment, the cleaning of the machine, or the surrender of the old notes and cancellation of the former sales agreement, was signed by *Mrs. Schwittay* and sent to the home office of the plaintiff for approval, as was required by the terms of this proposal, and was there approved on December 26th. Upon its return to Marinette plaintiff's agent caused it to be filed with the city clerk, received *Mrs. Schwittay's* notes, released the old agreement, and the unpaid notes of the deceased were surrendered. A number of these new notes were paid by defendant, and then after default was made by her as to seventeen of them this action was brought. The only defense interposed was that the notes were unenforceable by reason of plaintiff's failure to comply with sec. 1770*b*, Stats.

Both parties having moved for a direction of the verdict, the court made his findings of fact and conclusions of law, by the latter of which he determined that the sale of the machine with its attachment was doing business in the state of Wisconsin in violation of sec. 1770*b*, Stats., and that therefore the plaintiff's complaint should be dismissed and the notes signed by the defendant in payment for said machine be held void and returned to her, and judgment was ordered in accordance therewith, from which judgment the plaintiff has appealed.

For the appellant there was a brief by *Martineau, Evert & Martineau* of Marinette, and oral argument by *P. A. Martineau.*

For the respondent there was a brief by *Classon & Whitcomb* of Oconto, and oral argument by *Allan V. Classon.*

ESCHWEILER, J. The situation here is controlled and in favor of plaintiff by the decision in *Regina Co. v. Toynbee,* 163 Wis. 551, 158 N. W. 313. In that case a foreign un-

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licensed corporation, under a conditional sale contract in substance like the one here, sold a piano to a resident of Wisconsin. He afterwards sold the piano to the defendant, who removed it to another town in Wisconsin. The vendor subsequently took from this third person notes to the exact amount unpaid on the original contract with a new and similar conditional sale contract. There was no release of the original contract. This court held that the title to the instrument never passed to any one in this state and that therefore the transactions there involved amounted to no more than the collection of the vendor's claim upon its own property and that such piano still remained an article of interstate commerce.

In the case at bar the plaintiff, while still holding title under the original interstate transactions, took new security therefor from the widow of the original vendee. The widow continued the possession and use of the machine, necessarily only under and in recognition of the original transaction. By such possession and use she may well be considered as no stranger to the original transaction and as a substitute merely for the one who could no longer carry it out. Such a substitution of security as was here made is well within the ordinary incidents of commerce and does not destroy the interstate character of the original transaction. *F. A. Patrick & Co. v. Deschamp,* 145 Wis. 224, 228, 129 N. W. 1096.

The distinction is clear between this case and that of *Sprout, Waldron & Co. v. Amery M. Co.* 162 Wis. 279, 156 N. W. 158, relied upon by defendant. There an original interstate conditional sale of a flouring mill had been completely canceled by the giving of a new machine in place thereof. The first machine was set aside and its use discontinued by the vendees, and it remained in Wisconsin some months thereafter but no longer in any manner under the original contract. It was then sold to another resident of Wisconsin by the vendor, and this new and entirely inde-

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pendent sale was held to be within the ban of the statute here involved.

That there was a reduction made from the balance due no more alters the real substance of this transaction than would a similar reduction, if made in the lifetime of A. E. Schwittay, have affected the rights of plaintiff under the original sale.

Neither did the placing of the new attachment upon this machine at the time defendant gave her notes change the nature of the transaction. Clearly such an attachment, although placed on the machine in this state, is incidental and plainly germane to the sale. *York M. Co. v. Colley,* 247 U. S. 21, 38 Sup. Ct. 430; *S. F. Bowser & Co. v. Savidusky,* 154 Wis. 76, 142 N. W. 182; *Wolf Co. v. Kutch,* 147 Wis. 209, 214, 132 N. W. 981.

Looking at the real substance of the transaction, it is evident that the parties here were in effect completing and carrying out the original interstate sale of this machine and that therefore it was a lawful transaction binding and enforceable upon both parties.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment in favor of the plaintiff according to the prayer of the complaint.

SIEBECKER, J., dissents.

RYMER, Respondent, vs. MART, Appellant.

January 8—February 4, 1919.

Circuit court rules are binding: Relief under statutes: Appeal from justice's court: Leave to answer: Garnishment: Bank accounts: Failure to answer: Proof of nonexemption.

1. Rules prescribed for the guidance of circuit courts, where clear and unambiguous, must be followed. If injustice ensues through mistake, inadvertence, surprise, or excusable neglect, relief may be had under the statutes (sec. 2831, 2832, or others), upon proper application and showing.

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2. Under sec. 4 of Circuit Court Rule XXIX as it stood prior to the amendment of June 5, 1918, a circuit court had no power, in a case appealed from a justice's court wherein no answer had been interposed, to grant leave to answer after the first general term at which the case was properly triable.
3. A deposit in a bank in the name of a wife, with authority to the bank to honor checks drawn thereon by the husband, is *prima facie* an individual account, not a joint account which is not subject to garnishment.
4. Where the garnishee fails to make any answer, judgment may be rendered against him without proof that the garnished fund is not exempt from execution.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

A garnishment action was begun in justice's court against appellant and the Abrams State Bank in aid of an execution on a judgment against A. F. Mart, the husband of appellant. The Abrams State Bank answered, disclosing that it had a deposit of $501.02 in the name of appellant, with authority to honor checks thereon signed by A. F. Mart, her husband, who had drawn checks thereon. The appellant failed to answer or appear in the justice's court and judgment was rendered against her on April 28, 1917. May 11, 1917, she appealed to the circuit court; the record was filed therein May 25, 1917, and the case was properly triable at the next term of that court beginning June 4th. She duly served and filed a motion for leave to answer returnable on the first day of the term or as soon thereafter as counsel could be heard. The motion was not called to the attention of the court till June 16th, when the case was called for trial. When the motion came on for a hearing the clerk erroneously announced that no record from the justice had been filed, and the plaintiff's attorney thereupon moved to strike the case from the calendar, to which motion the appellant consented. The next term of the circuit court began November 12, 1917, and on December 1, 1917, when the case was called for trial, the appellant again moved for leave to file an an-

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swer. The court held that under the provisions of sec. 4 of Circuit Court Rule XXIX it had no power to grant such a motion at that time and entered a judgment against her for $186.43 and costs as upon a default, from which judgment she appealed.

For the appellant the cause was submitted on the brief of *Lehner & Lehner* of Oconto Falls.

John B. Chase of Oconto, for the respondent.

VINJE, J. The only serious question presented by the appeal is whether the circuit court properly held that under the provisions of sec. 4 of Circuit Court Rule XXIX as then in force it had no power to grant appellant's motion. That section reads:

"In all appeals from justice court in which an answer shall not have been interposed in justice court, eight days' notice of motion for leave to answer must be given and a copy of the proposed answer must accompany the notice of motion. Leave to answer upon such motion will only be granted upon payment of $5 costs, unless the court shall otherwise order for special cause shown, and leave to answer will not be granted after the commencement of the first general term of the court at which the action is or may properly be noticed for trial."

On June 5, 1918, the rule was amended by striking out the last sentence, beginning with the words "Leave to answer," and inserting in lieu thereof the following:

"The motion shall be brought on for hearing on or before the first day of the term or of the adjourned session thereof at which the case is triable and if not so brought on for hearing within said time the motion shall be granted only on terms."

It will be seen that a radical change was made in the rule by this amendment. As it stood before June 5, 1918, it expressly and explicitly declared that after the commencement of the first general term at which the action is or may properly be noticed for trial leave to answer *will not be granted.*

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This rule was binding upon the trial court and it had no power to abrogate or change it upon a mere motion for leave to file an answer, such as was the motion of the appellant. The court therefore properly held that it had no power to grant the motion upon the record as it then stood. Appellant made no other motion or application to be relieved from her default, though sec. 2831, Stats. 1917, gave her a remedy if the facts entitled her to one. Even now she can apply to the court under sec. 2832 to be relieved from the judgment if it was rendered against her through mistake, inadvertence, or excusable neglect.

Rules prescribed for the guidance of circuit courts, where clear and unambiguous, must be followed. If injustice ensues through mistake, inadvertence, surprise, or excusable neglect, relief may be had under the statutes referred to or others upon proper application and showing. No such application or showing was made in this case. On the other hand, the court was asked to suspend a rule without a showing of good cause therefor. This it could not do.

The claim that the answer of the Abrams State Bank showed a joint account of *Mrs. Mart* and her husband which was not subject to garnishment is not well taken. It *prima facie* showed an individual account of appellant. The fact that her husband had authority to draw against it made it none the less her account. Neither was it necessary for plaintiff to prove that the account was not exempt from levy on execution. Sec. 3728 provides that the justice shall enter judgment against a garnishee in default if judgment goes for plaintiff, and secs. 2766 *et seq.*, relating to garnishment in the circuit court, do not in a default case require proof of nonexemption of the garnished fund.

By the Court.—Judgment affirmed.

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STATE EX REL. LOEHR and another, Appellants, vs. HANSON and others, Town Supervisors, Respondents.

January 8—February 4, 1919.

Administrative boards: Dissipation of power by adjournments, etc.: Highways: Laying out: Jurisdiction of town board: Denial of application by failure to act in time: Appeal not seasonably taken.

1. The court expressly withholds assent to the proposition that an administrative body charged with *quasi*-judicial duties—in this case a town board, in the matter of laying out a highway—can dissipate its power, and deprive the public of the benefit of its exercise, by adjourning for a longer period than is allowed by statute, by failing to give the required notice of adjournment, or by not making award of damages within the statutory time.
2. Where, by reason of a failure to give the notices required by sec. 1267, Stats., or the fact that it is not satisfied that such notices have been duly given (sec. 1268), a town board has no jurisdiction to act on the day fixed for its meeting to decide upon an application for the laying out of a highway, it may, unless its power has otherwise been exhausted, proceed *ab initio*, order the service of new notices in the manner required by law, and thereby acquire jurisdiction for future valid action.
3. Under sec. 1276, Stats. (providing that failure of the supervisors to act upon an application for the laying out of a highway within sixty days after the filing thereof shall be deemed a refusal to lay out the highway), and sec. 1283 (providing that the matter shall not be acted upon again within one year thereafter), the power of the town board is exhausted at the end of the sixty days.
4. Where an appeal from such a refusal to lay out a highway was not taken within thirty days thereafter, as required by sec. 1276, Stats., the proceedings on the appeal, including an order of the commissioners directing the highway to be laid out, are of no force or effect, and the town board has no authority to proceed in the matter under such order.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

On the 8th day of September, 1916, a petition for the laying out of a highway was duly made to the supervisors of

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the town of Norway, Racine county. On the 5th day of December, 1916, the town board made out notices in which the 18th day of December, 1916, was fixed as the time when they would meet and decide upon said petition. The town board met pursuant to said notices on the 18th day of December, 1916, at the place therein fixed, at which time they were not satisfied that the notices given had been served as required by law, and adjourned until the 10th day of January, 1917, to ascertain whether notices to all the owners of the land had been duly given in accordance with the statute. They did not give any notice of adjournment. On the 10th day of January, 1917, the town board again met pursuant to said adjournment, at which time they were not satisfied that the notices of the meeting of December 18th had been given and served as required by law. They then decided to get out new notices. New notices were accordingly given fixing the 27th day of January, 1917, as the time when said board would meet and decide upon the petition. On the 27th day of January, 1917, they met at the time and place fixed in the notice and denied the petition. On the 20th day of February, 1917, the petitioners appealed from the order of the town board refusing to lay out the highway, and applied to the county judge of Racine county for the appointment of commissioners to review such order or determination under the provisions of sec. 1276, Stats. Said county judge duly appointed commissioners to review said order and determination of the town board. The commissioners met pursuant to law, reversed the action of the town board, and ordered the highway laid. Thereafter and on the 12th day of April, 1917, the town board met and assessed the damages of certain owners whose lands were taken by the laying out of said highway. An entry was made in the books of the town clerk setting forth that the said town board met as above mentioned and that such meeting was pursuant to the reversal of their order and determination previously made on January 27, 1917. The

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town board, however, never made nor filed any formal order with the town clerk and has at all times refused so to do. The petitioners thereupon filed a petition in the circuit court for Racine county praying for a peremptory writ of *mandamus* commanding the town board to open the highway and to do all other things contemplated and provided for by statute in order to insure to petitioners their full rights to the use of such highway. Upon such petition an alternative writ of *mandamus* issued. The town board made return thereto, setting up, among other things, the facts hereinbefore recited, contending that by reason thereof they had lost jurisdiction to act in the matter. The petitioners demurred to the return, which demurrer was overruled by the court. This appeal was taken from the order overruling the demurrer.

F. J. Walthers of Milwaukee, for the relators.

For the respondents there was a brief signed by *Storms, Foley & Beck* of Racine, attorneys, and *William W. Storms,* of counsel, and oral argument by *William W. Storms.*

OWEN, J. Unless the power of the town board of supervisors had been theretofore exhausted, its order of January 27, 1917, denying the petition was valid, and, as the subsequent proceedings leading to a reversal of that order were in all respects regular, appellants are entitled to the relief prayed for. The trial court thought that jurisdiction to act on the 27th had been lost (a) by adjourning for more than thirty days from December 18, 1916; (b) by not giving notice of adjournment as required by statute; and (c) by not making award of damages within forty days from December 18, 1916. Although the meeting of January 27th was held pursuant to new notices, which formed the basis of a new and independent proceeding, the trial court evidently construed the meetings of December 18th, January 10th, and January 27th as constituting but one proceeding instituted by the notices of the meeting of December 18th,

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and, having acquired jurisdiction and thereafter lost it, the power of the town board to decide upon the petition had vanished. Expressly withholding assent to the proposition that an administrative body charged with *quasi*-judicial duties can dissipate its power, and deprive the public of the benefit of its exercise, in any such manner, we will inquire, first, whether the town board ever acquired any jurisdiction which it could lose. That such a body does not exhaust its power by assuming to act without jurisdiction is settled by *State ex rel. Baker v. Haugen,* 164 Wis. 443, 160 N. W. 269. That case is authority for the proposition that if the town board had assumed to act upon the petition without jurisdiction—that is, without giving the notices required by statute, resulting in an invalid decision,—it could have proceeded over, *ab initio,* acquired jurisdiction, and exercised its power in a valid way. Hence, if it acquired no jurisdiction to act at its meeting of December 18th, it could do as it did on January 10th, order the serving of new notices in the manner required by statute, thereby acquiring jurisdiction for future valid action. It is conceded, of course, that if the board did not have jurisdiction to decide upon the petition on December 18th it had none on January 10th.

Did the board have jurisdiction on December 18th? In order to acquire jurisdiction, notices must be given and served within the time, upon the persons, and in the manner prescribed by statute. It cannot proceed until it is satisfied that such notices had been so served. Sec. 1268, Stats. The record of the town clerk made at the meeting of December 18th, as well as that of January 10th, shows affirmatively not only that the supervisors were not satisfied of such fact, but that one owner of real estate through which the proposed highway would run had not been served with notice, and there is no pretense here on the part of any one to the contrary. Under such circumstances it is plain that the town board had no jurisdiction to act upon the petition at the meeting of December 18th or January 10th, and

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that it was its privilege and its duty to give notices of the meeting of January 27th, unless its power was otherwise exhausted.

This brings us to a further consideration, not raised in briefs or upon argument, which stands as a more serious challenge of the power of the board to act on January 27th. In sec. 1276, Stats., it is provided:

"Failure of the supervisors to act upon the application [to lay out the highway] required by section 1267 within sixty days after the same was filed in the town clerk's office shall be deemed a refusal to lay out, alter, widen, or discontinue the highway; and any person who shall consider himself aggrieved by such refusal, may appeal therefrom in the manner herein provided for an appeal from the order refusing to lay out, alter, widen, or discontinue the highway."

There is a similar provision in sec. 1269 in the following language:

"Such order [the order laying or refusing to lay the highway], together with the award of damages hereinafter mentioned, shall be so filed [in the town clerk's office] within ten days after the day fixed by their notice or adjournment for deciding upon such application; and in case said supervisors shall fail to file such order and award within the ten days aforesaid they shall be deemed to have decided against such application."

This latter provision was considered in *State ex rel. Hewitt v. Graves,* 120 Wis. 607, 98 N. W. 516. It was there held that the failure to file the order and award of damages within the ten days amounted to a refusal of the town board to grant the application. It was said:

"When the time had expired, and no order and award had been filed, the statute stepped in and determined the fact that the application had been refused. It was as really and effectually refused as if a formal order of refusal had been filed, and under the terms of sec. 1283 it could not be acted upon again within the ensuing year."

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The same effect must be given to the provisions of sec. 1276, providing that if the petition is not acted upon within sixty days such failure shall be deemed a refusal to lay out the highway.

In this case the petition was filed with the town board on the 8th day of September, 1916. Sixty days from that time was November 7th. Nothing had been done by the town board within that time, nor was anything done until December 5th, when it was decided to give notice of the meeting on December 18th. On the 7th day of November, therefore, "the statute stepped in and determined the fact that the application had been refused." Under sec. 1283 the matter could not be acted upon again for the term of one year from November 7th. It follows that the power of the town board was exhausted by force of the statute of November 7, 1916. The appeal from the order denying the petition was not taken until February 20th. The statute required that it should be taken within thirty days from the time of the denial of the petition, which was November 7th. The proceedings on appeal, therefore, were of no force or effect. The order of the commissioners laying out the highway amounted to nothing. The town board has no authority to proceed in the matter of opening the highway, and the demurrer to the return was properly sustained.

By the Court—Order affirmed.

JENSEN, Appellant, vs. JENSEN, Respondent.

January 8—February 4, 1919.

Parent and child: Right to custody: Child's welfare paramount: Unfitness of mother: Marriage within year after divorce.

1. The paramount right of the father to the custody of his children, recognized by the common law and by the words of our statute (secs. 3964, 3965, Stats.), has become a mere *prima facie* right. The welfare of the child is now the controlling consideration; and with regard to children of tender

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years, especially girls, preference will ordinarily be given to the mother, other things being equal and she not being unfit.

2. The fact that, within three months after divorce from the father, the mother of a girl of tender years was, in violation of our divorce statute, in form married to another man in another state and thereafter lived with him as his wife in this state, does not conclusively show depravity of heart or moral unfitness to bring up the child.

3. Where, in such case, the mother claimed, and there was a probability, that she supposed the second marriage would be lawful, and there was no other suggestion of unfitness, the child should not be taken from her care; especially when it appeared that with her the child had a good home and was well taken care of, and that the father would probably not be able to give her personal attention but expected to leave her care to grandparents.

APPEAL from an order of the municipal court of Racine county: WILLIAM SMIEDING, JR., Judge. *Reversed.*

This is an appeal from an order after judgment in a divorce action, changing the custody of the minor child of the parties from the mother to the father. The parties lived in Racine and were divorced at the suit of the wife March 24, 1917, and the custody of their only child, Dorothy, then four and one-half years of age, was awarded to the plaintiff, the defendant being required to pay the plaintiff $5 weekly for the child's support. July 5, 1917, the plaintiff went to Michigan with one Jepeway and was in form married to him. She returned to Wisconsin with Jepeway and was thereafter supported by him at Racine. March 25, 1918, the plaintiff and Jepeway went to Waukegan, Illinois, and again went through a marriage ceremony, and from that time lived together in Racine as man and wife. In April, 1918, a child was born as a result of the plaintiff's second marriage. The plaintiff and her present husband maintain a home at Racine, and the child Dorothy has lived with them. The testimony shows without substantial contradiction that the child has been well taken care of according to its station in life and is happy in her home with her mother.

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The defendant is a machinist. He has at present no home in Racine, but lives with his parents, who own a good home in that city. For more than a year just prior to the hearing of the motion he had been employed at a government munition plant at Sharon, Pennsylvania, and had received an injury in the eye which incapacitated him from labor for some months. During this time he paid no money for the support of the child because he was earning nothing, and on June 1, 1918, there was $190 past due thereon. The defendant's parents, who are about fifty years of age, are willing to take the child and give it a home and educate it. The court found the mother not a fit person to have the care of the child and changed its custody to the father on condition that he pay the amount past due for its support and also pay to plaintiff's attorneys a balance still due them for attorneys' fees in the case.

For the appellant there was a brief signed by *Storms, Foley & Beck* of Racine, attorneys, and *Jerome J. Foley,* of counsel, and oral argument by *William W. Storms.*

Guy A. Benson of Racine, for the respondent.

WINSLOW, C. J. The paramount right of the father to the custody of his children, which was recognized by the common law and by the words of our statute (secs. 3964, 3965, Stats.), has become the merest *prima facie* right, which yields readily when it is shown not to be best for the child. *Welch v. Welch,* 33 Wis. 534; *Sheers v. Stein,* 75 Wis. 44, 43 N. W. 728. The welfare of the child is now the controlling consideration; and with regard to children of tender years, especially girls, preference will ordinarily be given to the mother, other things being equal and she not being unfit. The reasons for this last rule are very obvious and need not be elaborated here. *Umlauf v. Umlauf,* 128 Ill. 378, 21 N. E. 600; *Brandon v. Brandon,* 14 Kan. 342; *Smith v. Smith,* 15 Wash. 237, 46 Pac. 234.

In the present case the evidence affirmatively shows that the child is furnished a good home by her mother and is

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well taken care of. Really the only substantial argument which can be advanced in support of the order changing the custody is that the mother has conclusively shown moral unfitness by reason of her attempted marriage to and cohabitation with Jepeway in Michigan three months after the divorce decree was pronounced, in violation of our divorce statute, which provides that the decree shall not be effective, so far as the status of the parties is concerned, until the expiration of one year. Secs. 2330, 2374, Stats.

This act was of course a violation of law, but it does not necessarily demonstrate depravity of heart or moral unfitness to bring up a child. While this court has held that the Wisconsin divorce statute prohibits Wisconsin citizens from evading its provisions by making a trip to another state and there contracting another marriage during the year (*Lanham v. Lanham*, 136 Wis. 360, 117 N. W. 787), the argument that statutes of this nature can have no extraterritorial effect was very strongly made in that case and has been successfully made in some jurisdictions. *Dudley v. Dudley*, 151 Iowa, 142, 130 N. W. 785, and cases cited in the opinion in that case. Both of the participants in the transaction here in question claim that they supposed they could lawfully be married.

There is no evidence that the plaintiff was specifically advised that she might not marry within the year in another state or had any knowledge of the sweeping construction which this court had placed upon the law. If, as seems probably the fact, she supposed that the divorce was complete and that she was simply forbidden to remarry for a year, her act in remarrying does not place her in the same class as the wilful adulteress, nor does it necessarily stamp her as an unfit person to bring up her child. The moral quality of many acts depends upon the condition of the mind and the information possessed by the actor, and this is such an act.

We do not think that, in the absence of any other claim of unfitness and in the face of proof showing that the child is being well taken care of, a girl of tender years should

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have been taken from its mother's care; especially when it appeared that the father would probably not be able to give the child personal attention, but expected to leave its care to grandparents.

By the Court.—Order reversed, with costs, and action remanded with directions to dismiss the petition.

WERNER, Respondent, vs. RANDALL, Respondent, and another, imp., Appellant.

January 8—February 4, 1919.

Partition of land: Division of proceeds of sale: Rental charge against part owner in possession: Accounting.

In a partition suit for the determination of the respective rights of the parties in a farm and to the proceeds of a sale thereof, a finding by the trial court that one part owner was chargeable with $2,000 as rent for one year during which he had possession of the farm is approved, except that the amount is reduced to $1,600 as being the proper rental charge; an allowance is made to said part owner for improvements and for plowing; an account is stated; and the judgment and order of distribution made by the trial court are modified accordingly.

APPEAL from a judgment of the circuit court for Kenosha county: JOHN J. GREGORY, Judge. *Modified and affirmed.*

This is a partition suit whereby the parties thereto agreed to have their respective rights to the property in question and to the proceeds of the sale thereof ascertained and determined by the court.

During the year 1915 *Clausen* and King were owners of equal undivided shares of a 400-acre farm, known as the Kellogg farm, in Kenosha county. *Clausen* had actual possession at an agreed rental of $1,600 for the year from March, 1915, to March, 1916. The transactions between *Clausen* and King were in the nature of mutual open ac-

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counts. On or about April 22, 1916, King deeded his entire undivided half interest in the farm to defendant *Randall,* and *Randall* immediately thereafter deeded one half of his entire interest to plaintiff, *Werner,* who brought this suit for partition.

At this time it appears that *Werner* is the owner of an undivided one-fourth share of the farm; that *Louis E. Randall* is the owner of an undivided one-fourth interest; that *John Clausen* owns a one-half interest in the farm; that M. Moyca Newell was the owner of a mortgage on the above described property for the sum of $15,000; that Louis Keuck was a tenant of a part of the farm.

Herman A. King and his wife, Jennie T. King, filed an answer to the complaint of plaintiff, *Werner,* wherein they allege that in the purchase and operation of the farm it was expressly agreed by and between King and *Clausen* that the costs thereof should be borne by them equally and that the net proceeds thereof should be shared by them in equal portions; that King actually and necessarily disbursed and applied of his individual assets in and about the operation of the farm the sum of $2,505.12, receiving therefrom only $42.20; that defendant *Clausen* received and held and still holds large sums of money derived from rental of the farm, the sale of the gravel therefrom, and other similar sources, amounting in all to the sum of $3,000, for which King demanded an accounting; that *Clausen* also received upon the sale of the farm to the present owners, by way of earnest money, the sum of $1,000, for which he has also failed to account to defendant King.

The answer of the defendants *John Clausen* and wife denies that *Clausen* and King were copartners and alleges that these premises have been at all times in *Clausen's* possession and that he has had full management of the same, accounting to Herman A. King as a cotenant, and that he has leased said property to others in his own name; that the conveyance of one half of the property by Herman A. King to *Louis E.*

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Randall, who thereupon deeded one half of his share to the *Werners,* is fraudulent and void for want of authority. The answer of the *Clausens* demands that the deeds executed by King to the *Randalls,* and by *Randall* to *Werner,* be adjudged fraudulent and declared null and void, and that *Clausen* and King be adjudged to be the owners as tenants in common of the property; that the accounts between these defendants be adjudged, and that judgment be entered accordingly.

The court found that the agreement entered into by King and *Clausen* on their purchase of the so-called Kellogg farm did not constitute a copartnership and did not authorize King to enter into a conveyance of the farm on behalf of both parties as copartners, and that the conveyance to the *Randalls,* dated April 22, 1916, conveyed to them only the interest of defendant King and his wife; that the deed from *Randall* to *Werner* conveyed only an undivided one-fourth interest, and as such owner *Werner* was entitled to bring this action for partition; that *Clausen* is still the owner of the undivided half interest in the farm, and that the conveyances by King to the *Randalls* does not affect the ownership of *Clausen* to his undivided half interest in the farm; that the ownership of the farm is now as follows: *Clausen,* undivided one-half; *Randall,* undivided one-fourth; *Robert G. Werner,* undivided one-fourth; that defendant *Clausen* is liable for the sum of $2,000 for the rental of the farm for the farm year from March, 1916, to March, 1917; that he is entitled to one half thereof and shall pay to plaintiff, *Werner,* $500 and to defendant *Randall* $500; that if *Werner* is entitled to any commission for services claimed to have been rendered in the sale of property he must look to defendant King for payment; that there is due to Herman A. King from *John Clausen* the sum of $2,234.72.

The court ordered the sale of the farm. It was sold for $38,000. Less mortgage and accrued interest and disbursements there remained $22,411, which was divided among

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the parties as follows: one fourth to plaintiff, *Werner,* one fourth to defendant *Randall,* one half to *Clausen,* and the court found there was due to King $2,234.72 from *Clausen.* On February 20, 1918, the court ordered a distribution of this fund as follows: to *Randall,* $5,602.83; to *Werner,* $5,602.83; to King, $2,234.72; to *Clausen,* $7,970.95. One thousand dollars of *Clausen's* share remained in the hands of the clerk for final distribution.

Defendant *Clausen* appeals from the part of the judgment wherein the court holds that *Clausen* is liable for the rent of the farm for the year 1916-1917 at a rental of $2,000; and also from the order of April 30, 1918, distributing the balance of the proceeds in the hands of the clerk of the court.

Henry J. Hastings of Kenosha, for the appellant *Clausen.*

For the respondents there was a brief by *Buckmaster & Hammond* of Kenosha, for *Robert G. Werner,* and *Daniel M. Healy* of Kenosha, for *Louis E. Randall;* and the cause was argued orally by *A. E. Buckmaster.*

SIEBECKER, J. The controversy presented on this appeal affects no part of the litigation involved in the action other than whether or not *Clausen* is liable for rent of the farm for the year from March, 1916, to March, 1917, and what amounts the appellant, *Clausen,* and the respondents *Randall* and *Werner,* are respectively entitled to receive of the moneys now in the hands of the clerk of the court.

The trial court held that *Clausen* is liable for rent of the farm for the year here involved, and found that $2,000 is a reasonable rent charge. *Clausen* insists that, first, he is not liable for any rent for this farm year, and secondly, that if he is to be charged for such rental $2,000 is an unreasonable and excessive amount. As above shown, the respondents *Randall* and *Werner* became the owners of King's undivided half interest in the farm in April, 1916, and hence *Clausen, Randall,* and *Werner* have title to the farm in common from that time. The record shows that these owners did not lease

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the farm to a third party after April, 1916, and that they did not mutually agree that *Clausen* should remain in possession of it as he did at a stipulated rental for the year 1916-1917. The facts and circumstances showing *Clausen's* possession of the farm for this year support the court's conclusion holding him liable for its reasonable rental value. The court held that he ought to pay $2,000. The court manifestly determined that this was the proper rental charge for him to pay, because he refused to accept one Larsen as tenant, who had an agreement with *Randall* and *Werner* to become the tenant of the farm and to pay this amount of rent for the year. *Clausen* was not obligated to accept Larsen as a tenant. The facts disclosed by the record concerning this alleged arrangement of *Werner* and *Randall* with Larsen, are not persuasive as showing that it was the fair and reasonable rental of the farm. It appears that the years preceding and following the one in question the rental value of the farm did not exceed $1,600, and nothing is shown that the use of the farm was worth more than this for the year involved. We are constrained to hold that the circuit judge erred in charging *Clausen* $2,000 rent as he did, and that finding must be modified by reducing it to $1,600 as the proper charge against *Clausen* as rent for this year. The claim of *Clausen* that he paid and settled this rent with King in the settlement of all claims between them and approved by the trial court in awarding King recovery against *Clausen* for $2,234.72, is not sustained. The fact that the trial court charged *Clausen* $2,000 clearly shows that the court did not so regard it. The stipulation fixing this amount due King recited that it does not include any items subsequent to March, 1916. Furthermore, King sold his interest in the farm in April, 1916, to *Randall*, and he had no interest in or right to settle for the *Clausen* rent or for his expenditures on the farm after such conveyance. It does appear that the trial court in its judgment erroneously deducted from the amount *Clausen* was indebted to King as fixed by their stipu-

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lation the sum of $98.75, representing part of the items *Clausen* expended on the farm after King had sold his interest to *Randall*. That part of the judgment is not, however, appealed from; the error must be disregarded on this appeal between *Clausen* and the respondents. This does not prevent a correct statement of the account between the appellant, *Clausen*, and the respondents *Randall* and *Werner*. We find *Clausen* chargeable with $1,600 rent for the farm from March, 1916, to March, 1917. He is to be credited $500 on this as rent paid by his subtenant; this sum came into the receiver's hands and is included in the net balance of $352.29 he paid to the clerk, who now holds it for distribution. *Clausen* presented a claim for money he expended on the farm after King sold to *Randall* and before the receiver took possession in the spring of 1917. Of this claim it appears that the following items should be allowed him for improvements and for plowing:

520 rods of fence at 40c	$208 00
8 farm gates	50 00
30 staples	1 50
100 posts	18 00
Labor on fence	100 00
60 acres plowing at $3 per acre	180 00
Total	$557 50

The other items of this claim must be rejected because the evidence does not show that they are of the nature of farm improvements.

The *Clausen* farm account is as follows:

Dr. to rent	$1,600 00
Cr. by rent paid	500 00
Balance due for rent	$1,100 00
Amount due *Clausen* on farm improvement account	557 50
Balance rent due from *Clausen*	$542 50
Add to this amount the receiver paid the clerk to farm account	352 29
	$894 79

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The final balance represents the proceeds on hand of the farm transactions after deducting the sum the court distributed on February 20, 1918. One half of this balance, namely, $447.39, belongs to *Randall* and his grantee, *Werner,* and the other half to *Clausen.*

It follows that the judgment awarding recovery from *Clausen* of a rental of $2,000 for the farm year from March, 1916, to March, 1917, must be modified by reducing it from $2,000 to $1,600; and that the final order distributing the moneys in the hands of the clerk is so modified and the clerk is ordered to disburse the moneys in his hands as follows:

To *Randall*	$223 69
To *Werner*	223 69
To *Clausen*	904 90

As so modified the judgment and final order of distribution are affirmed, the appellant *Clausen* to recover costs.

By the Court.—It is so ordered.

YAHNKE, Respondent, vs. LANGE and others, Appellants.

January 10—February 4, 1919.

Automobiles: Collision with wagon at night: Negligence: Contributory negligence: Insufficient lights on both vehicles: City ordinance: Construction: Pleading: Evidence: Milwaukee civil court: Appeal: Review in circuit court.

1. One who, in violation of sec. 1636—52, Stats., drove an automobile at night, with only dim sidelights thereon, on the streets of a city, too fast to enable him to stop the car within the distance ahead that he could see an object the size of a person, was guilty of negligence with respect to a collision with the rear end of plaintiff's milk wagon, even though, after discovering the presence of the wagon a few feet in front of him, he could not by the exercise of ordinary care have avoided striking it.
2. Where at the time of such collision plaintiff's wagon did not have attached to it a lighted "lamp or lamps . . . so displayed as to be visible from the rear and front of such vehicle," as required by an ordinance of the city, plaintiff also was guilty

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of negligence which, if it contributed to the injury, precludes a recovery by him therefor.

3. A lantern hung on the left side of the box-like superstructure of the milk wagon did not constitute a compliance with the ordinance, because not visible to one coming from the rear if he was somewhat to the right of the wagon; nor did another lantern on the floor of the wagon in front of the driver's seat and otherwise obscured, constitute a compliance.
4. An allegation in the answer that at the time in question plaintiff, "in violation of the ordinances of the city, . . . neglected to have attached to said milk wagon a lamp or lamps duly lighted and so displayed as to be visible from the rear of such vehicle," and that the "collision was due wholly to the absence of such lights and the violation of the plaintiff of such ordinance," is *held*, though not directly alleging the existence of the ordinance, to have been sufficient to apprise plaintiff of the defense relied upon and to authorize the introduction of the ordinance in evidence.
5. A finding by the Milwaukee civil court that the absence of proper lights on the milk wagon proximately contributed to the accident is *held* not to be against a clear preponderance of the evidence.
6. A judgment of the Milwaukee civil court should not be reversed by the circuit court in the absence of error such as would justify a reversal of a judgment of the circuit court by the supreme court.

APPEAL from an order of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

This is an action brought in the civil court of Milwaukee county to recover damages resulting from a collision of an automobile, owned by defendants and appellants and driven by appellant *W. W. Lange*, with a milk wagon belonging to the plaintiff. It was tried by the court without a jury.

The evidence shows that between 1 and 2 o'clock in the morning of August 4, 1916, plaintiff's milk wagon was proceeding in a southwesterly direction on Kinnickinnic avenue in the city of Milwaukee. Somewhere between Homer and Otjen streets on said Kinnickinnic avenue, an automobile, owned by defendants and appellants and then driven by defendant and appellant *W. W. Lange*, ran into the milk wagon from behind, throwing the milk wagon against the

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curb, causing the horse to run away, resulting in considerable damage to the wagon and its contents. There is evidence that the night was foggy, but to what extent does not appear. Ordinarily there were street lights at the intersection of Kinnickinnic avenue and Homer street and also at the intersection of Kinnickinnic avenue and Otjen street. At the time of the collision the street lamp at the Homer-street intersection was out, but the one at the Otjen-street intersection was burning. At the time of the accident the milk wagon and automobile were proceeding from Homer street to Otjen street. The automobile was equipped with four lights in front, two sidelights and two strong front lights. At the time of the accident the front lights were out and only the sidelights were turned on. Other material facts will appear in the opinion.

Findings of fact and conclusions of law were filed, wherein the defendants were acquitted of negligence and the plaintiff was held guilty of contributory negligence. Judgment was rendered for the defendants and appellants. Upon an appeal to the circuit court for Milwaukee county the judgment of the civil court was reversed and a new trial ordered. The case is here on appeal from that order.

Edgar L. Wood of Milwaukee, for the appellants.

For the respondent there was a brief by *Gugel & Kline* of Milwaukee, and oral argument by *F. H. Gugel.*

OWEN, J. The civil court acquitted the defendants, and convicted the plaintiff, of negligence, although the undisputed evidence showed that both were violating the law. Concededly the defendant *W. W. Lange* was driving the automobile owned by defendants on the streets of Milwaukee, at night, with only dim sidelights functioning, too fast to enable him to bring the automobile to a stop within the distance ahead that he could, with the aid of such lights and the lights from other sources, see an object the size of a person, as the law requires. Sec. 1636—52, Stats. He was

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held free from negligence. The plaintiff, who permitted his milk wagon on the street in but partial compliance with an ordinance of the city of Milwaukee, was held negligent. It was held that the absence of headlights on the automobile efficient to light up the street ahead had nothing to do with producing the accident, while the absence of a light visible from the rear of the milk wagon proximately contributed thereto. Such contradictory findings can stand only by judicial sanction of a legal paradox. The reasoning leading to these diametrically opposite conclusions—"making fish of one and fowl of the other"—is quite incomprehensible.

We readily agree with the circuit court that the defendant *W. W. Lange* was guilty of negligence. *Lauson v. Fond du Lac,* 141 Wis. 57, 61, 123 N. W. 629. As said by the circuit judge:

"It may be that the driver, after he discovered the presence of the wagon when within a few feet of him, could not by the exercise of ordinary care avoid striking it, but the conclusion is irresistible that the driver was negligent in getting into such a position. The driver violated the statute mentioned, either in driving at such a rate of speed that he could not bring the automobile to a stop within the distance that he could see an object the size of a person, or his lights were insufficient to enable him to see objects ahead of him in time to avoid them."

But that does not dispose of the case. If plaintiff was guilty of negligence which proximately contributed to the accident he cannot recover. *Lloyd v. Pugh,* 158 Wis. 441, 149 N. W. 150; *Ludke v. Burck,* 160 Wis. 440, 152 N. W. 190. An ordinance of the city of Milwaukee, then in force, required vehicles such as plaintiff's milk wagon, while on any public street of the city of Milwaukee, to "have attached to it a lamp or lamps which shall be kept lighted during the period from thirty minutes after sunset to thirty minutes before sunrise, and shall be so displayed as to be visible from the rear and front of such vehicle during said period from thirty minutes after sunset to thirty minutes

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before sunrise." Plaintiff's milk wagon was fashioned much after the ordinary milk wagon in common use, and consisted of a box-like top or superstructure superimposed on the running gear, with doors on the sides thereof. At the time of the accident a lantern was hung outside the door on the left side of this box-like covering and about midway between the front and rear thereof. There was another lantern on the floor of the milk wagon in front of the driver's seat. Immediately back of the lantern milk cases were piled three deep, each case being at least six or seven inches high. It is at once apparent that the side lantern, while visible to one coming from the rear on the left-hand side of the wagon, would not be visible to one coming on a line further to the right, the line of vision being cut off by the top of the milk wagon. A lantern so displayed cannot be considered a compliance with either the letter or the spirit of the ordinance. Whether or not the lantern on the inside threw any light through the rear opening, which to our minds is exceedingly doubtful, we do not hesitate to say that it fell far short of a compliance with the ordinance. It follows that the plaintiff's milk wagon was on the street in the city of Milwaukee contrary to the provisions of the ordinances of that city. This constituted negligence on the part of the plaintiff. *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041; *Griswold v. Camp,* 149 Wis. 399, 135 N. W. 754; *Lloyd v. Pugh,* 158 Wis. 441, 445, 149 N. W. 150; *Ludke v. Burck,* 160 Wis. 440, 152 N. W. 190. That such negligence proximately contributed to the injury was found by the civil court. A judgment of the civil court of Milwaukee county should not be reversed by the circuit court in the absence of error such as would justify a reversal of a judgment of the circuit court by this court. *Pabst B. Co. v. Milwaukee L. Co.* 156 Wis. 615, 620, 146 N. W. 879; *Schmidt v. Franklin,* 164 Wis. 128, 159 N. W. 724; *Mechanical A. Co. v. A. Kieckhefer E. Co.* 164 Wis. 65, 159 N. W. 557. We think the finding that the absence of lights on the milk wagon contributed to the accident cannot be said

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to be against the clear preponderance of the evidence, and that it must stand, from which it follows that plaintiff cannot recover.

Respondents, however, contend that the ordinance is not before the court because it was not properly pleaded. The allegation of the answer under which the ordinance was admitted in evidence was to the effect

"that on the said 4th day of August, 1916, at the time the plaintiff's said milk wagon was upon Kinnickinnic avenue, it was in the nighttime at about 1 o'clock in the morning of said day, and that the plaintiff, in violation of the ordinances of the city of Milwaukee, failed and neglected to have attached to said milk wagon a lamp or lamps duly lighted and so displayed as to be visible from the rear of such vehicle, and that if the plaintiff's said vehicle and the horse attached thereto sustained any damage or injury, at the time and place mentioned, by reason of the collision with an automobile operated by either of said defendants, such collision was due wholly to the absence of such lights and the violation of the plaintiff of such ordinance."

While the existence of the ordinance was not directly alleged, it was alleged that the presence of the vehicle on the street at the time was in violation of the ordinances of the city of Milwaukee. This was entirely sufficient to apprise the plaintiff that defendants relied upon the noncompliance on his part with the ordinances of the city of Milwaukee, requiring lamps to be lighted and displayed upon the milk wagon so as to be visible from the rear of such vehicle, as a defense to the action. Plaintiff could not claim that he was surprised by the offering of the ordinance in evidence. Under the liberal rules by which pleadings are now tested we must hold the allegation quoted to be sufficient to apprise the plaintiff of the defense relied upon and to authorize the introduction of the ordinance in evidence.

By the Court.—Order reversed, and cause remanded with directions to affirm the judgment of the civil court.

ESCHWEILER, J., dissents.

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STATE EX REL. LABUWI, Plaintiff in error, vs. HATHAWAY, Sheriff, Defendant in error.

January 10—February 4, 1919.

Criminal law: Obtaining money by false pretenses: Confidence game: Gross fraud or cheat.

1. One who, knowingly and with intent to defraud, falsely advertises and represents that a certain entertainment and celebration conducted and managed by him is for the benefit of the Red Cross, when it is not; that "the committee" (posters being so signed) is acting for the Red Cross or some part of the public, when it is not; and that he is engaged in the business of securing funds for the Red Cross, when he is not, and who by such means obtains moneys which he would not otherwise obtain, is guilty of the offense of obtaining money under false pretenses as defined by sec. 4423, Stats. 1917.
2. Such acts do not constitute the offense of playing the confidence game mentioned in sec. 4568*m*, Stats. 1917. That statute seems to contemplate that some visible material token or symbol shall be used or manipulated in such a manner that the confidence of the victim is gained, or in such a manner as to inspire confidence in the victim that he can beat the manipulator at his own game.

[3. Whether such acts constitute a gross fraud or cheat at common law, under sec. 4430, Stats. 1917, not considered.]

ERROR to review an order of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The relator was arrested upon a complaint charging in the first count that on the 4th day of July, 1917, at Neosho, Dodge county, this state, he did unlawfully and feloniously obtain from divers persons therein named certain specified sums of money by means and use of the confidence game mentioned in sec. 4568*m*, Stats. 1917. The second count as amended alleged that the relator, at the time and place mentioned,

"contriving and fraudulently intending to cheat and defraud the people of the state of Wisconsin, did knowingly, wilfully, falsely, fraudulently, deceitfully, artfully, and feloniously publicly advertise, conduct, represent, and manage a certain entertainment and celebration as being for the benefit

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of the American Red Cross Association, and did then and there publicly advertise, announce, and proclaim to the people of said state of Wisconsin that all the proceeds in money derived by and from said celebration and of admission fees charged for admission thereto, and articles sold thereat, and otherwise, over and above the expenses of said celebration, would all be paid to the American Red Cross Association, did then and there hold, conduct, and manage a celebration and entertainment, and did then and there knowingly, wilfully, falsely, fraudulently, and deceitfully charge divers people of the state of Wisconsin admission fees thereto and receive and take from the said people of this state large sums of money for such admissions and for articles sold at such entertainment and celebration, and did then and there by means of said artful and deceitful advertisements and representations, and then and there well knowing the same to be false, fraudulent, and deceitful, and well knowing that said celebration and entertainment was not held for the benefit of the American Red Cross Association, and well knowing that the proceeds in money, as aforesaid, were not to be paid over to the American Red Cross Association, and then and there well knowing that said celebration was in fact to be held and was in fact held for the joint benefit of him, the said *Edmund J. Labuwi,* and one August Nell and one Mary Franke, and well knowing that all the proceeds and money aforesaid were to be divided between and among said *Edmund J. Labuwi,* said August Nell, and said Mary Franke, he, the said *Edmund J. Labuwi,* did then and there knowingly, fraudulently, deceitfully, and feloniously, and with intent to defraud and by means of the aforesaid false and fraudulent advertisements and representations, obtain of and from John Mann the sum of seven dollars and seventy-five cents ($7.75) of the money of said John Mann, and from A. C. Stock the sum of ten dollars ($10) of the money of said A. C. Stock, and from William Wegwart the sum of one dollar and seventy-five cents ($1.75) of the money of said William Wegwart, and from Charles J. Skwor the sum of one dollar and twenty-five cents ($1.25) of the money of said Charles J. Skwor, and from divers other persons to the number of more than forty-six hundred the sum of more than thirty-two hundred dollars ($3,200) of the money of such divers persons, the said money so ob-

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tained being then and there of the value of more than thirty-two hundred dollars ($3,200), whereas in truth and in fact the said celebration was not held and conducted for the benefit of the American Red Cross Association and was not intended by said *Edmund J. Labuwi* to be so held and conducted; and whereas in truth and in fact it was not the intention of said *Edmund J. Labuwi* to pay over to the American Red Cross Association the proceeds in money of said celebration and entertainment; and whereas in truth and in fact the proceeds in money to be derived from said celebration and entertainment was not in fact to be paid to the American Red Cross Association, and was in fact to be divided between and among said *Edmund J. Labuwi,* said August Nell, and said Mary Franke, as he, the said *Edmund J. Labuwi,* then and there well knew; and the said John Mann, A. C. Stock, William Wegwart, Charles J. Skwor, and the said divers persons to the number of more than forty-six hundred hereinbefore mentioned, each and all then and there believed the false pretenses aforesaid, and each being deceived thereby was induced by reason of the false pretenses and representations so made as aforesaid to deliver and did then and there deliver to the said *Edmund J. Labuwi* the respective sums of money aforesaid."

At the preliminary hearing had in March, 1918, testimony was given by a number of witnesses to the effect that they attended the celebration believing and relying upon the fact that it was given for the benefit of the Red Cross; that they would not have attended but for such belief; that they spent money more freely on that account, and that some of them refused to take change on making purchases because they wished to make a donation to the Red Cross, and some gave services gratis for the same reason. Posters signed "The Committee" and advertisements in papers stating that "Proceeds go to American Red Cross" were introduced in evidence. The evidence also tended to show that a substantial net profit was made, but that no offer to pay any money over to the Red Cross was made as late as five months or more after the celebration was held.

At the close of the preliminary examination the relator

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was bound over to the circuit court for Dodge county to answer to such information as the district attorney might file against him. The relator secured a writ of *habeas corpus* from the county judge of Dodge county returnable before the county court. After a hearing upon said writ he was by order of the court remanded to the custody of the sheriff of Dodge county, and upon a review of said order by the circuit court for Dodge county it was affirmed, and the relator obtained a writ of error from this court to review the order of the circuit court.

C. M. Davison of Beaver Dam, attorney, and *Frank T. Boesel* of Milwaukee, of counsel, for the plaintiff in error.

For the defendant in error there was a brief by *Spencer Haven,* attorney general, *J. F. Baker,* assistant attorney general, and *Claron A. Markham,* district attorney of Dodge county; and the cause was argued orally by *Mr. Baker* and *Mr. Markham.*

VINJE, J. The relator claims that the complaint and evidence are insufficient to show that any offense known to the law was committed, because at best they show only a promise to do something in the future, and that the failure to fulfil such a promise is not an offense. The state argues that the complaint and evidence show any one of three distinct offenses, namely: (1) playing the confidence game mentioned in sec. 4568*m,* Stats. 1917; (2) a gross fraud or cheat at common law under sec. 4430; and (3) obtaining money under false pretenses as defined by sec. 4423.

Without attempting to define the statutory confidence game we have reached the conclusion that the complaint and evidence do not bring the alleged acts of the relator within it. The statute seems to contemplate that some visible material token or symbol shall be used or manipulated in such a manner that the confidence of the victim is gained, or in such a manner as to inspire confidence in the victim that he can beat the manipulator at his own game. In this case neither element was present.

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Since our statute penalizing the obtaining of money under false pretenses is largely if not entirely an amplification of the common-law fraud or cheat offense, it is not deemed advisable to direct our attention to an analysis of such offense, but rather to direct it to the false pretense statute itself, which is quite specific and has received repeated construction by this court, as have similar statutes by other courts.

In *Baker v. State,* 120 Wis. 135, 97 N. W. 566, it was held that the obtaining of money under false pretenses for an ostensibly charitable purpose came within the statute. So the question is, Did the relator, by means of false pretenses, secure money that he would not otherwise have secured had such pretenses not been used.

A false pretense, within the meaning of the statute, is the representation, with the intent to defraud, of the existence of some material fact or circumstance calculated to mislead which does not exist and which the accused knows to be false or has no reason to believe is true. *Clawson v. State,* 129 Wis. 650, 109 N. W. 578; *Comm. v. Stevenson,* 127 Mass. 446; *State v. Briggs,* 74 Kan. 377, 86 Pac. 447, 7 L. R. A. N. S. 278 and note; 11 Ruling Case Law, 831.

A mere naked promise to do something in the future or to pay for goods in future is not sufficient to constitute a false pretense within the statute. *Comm. v. Drew,* 19 Pick. (36 Mass.) 179; *State v. Briggs, supra.* But a false representation that some material fact or circumstance exists, coupled with a promise to do something in the future, comes within the statute. *Thomas v. People,* 34 N. Y. 351; *State v. Briggs, supra; Taylor v. Comm.* 94 Ky. 281, 22 S. W. 217; *State v. Fooks,* 65 Iowa, 196, 452, 21 N. W. 561, 773.

Assuming the evidence and the allegations of the complaint to be true, we find that the relator represented (a) that the celebration was for the benefit of the Red Cross, when it was not; (b) that the committee acted for the Red Cross or some part of the public, when it did not; and (c) that he was engaged in the business of securing funds

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for the Red Cross, when he was not. These were all false representations of material facts which he claimed existed, and it is alleged and the evidence shows that upon the strength of them he secured money that otherwise he would not have secured. That an appeal to the patriotism of the people at the time and for the cause assigned was a most potent purse-opener cannot be doubted. The conclusion reached, therefore, is that the complaint charges the offense of obtaining money under false pretenses as defined by sec. 4423, Stats. 1917, and the evidence shows that there is probable cause to believe the relator guilty thereof.

By the Court.—Order affirmed.

BORCHERT and another, Appellants, vs. SKIDMORE LAND COMPANY, imp., Respondent.

June 7—March 4, 1919.

Vendor and purchaser of land: Assumption of mortgages: When contract and deed cannot be contradicted by parol: Authority of agent.

1. By a written contract, unambiguous and complete in itself, a land company agreed to convey to one C. certain land in consideration of his deeding to it certain other land "subject to mortgages amounting to" a certain sum, and the subsequent deed from C. to the company recited that it was "subject to the following mortgages," naming them; but neither in the contract nor the deed did the company assume and agree to pay the mortgages. *Held,* that the terms upon which the company agreed to part with its land and the terms upon which it was to receive the land of C. were contractual terms, and that parol testimony was not admissible to show that the consideration actually agreed upon included the assumption and payment of the mortgages by the company.
2. The provision as to consideration in the contract did not merge in the deed so that, as a mere recital in the deed, it could be contradicted by oral testimony.
3. A finding by the trial court that an agent of the land company, who acted for it under written instructions in the matter of the execution of the conveyances, and who, it was claimed, at

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that time orally agreed on behalf of the company to assume and pay the mortgages, had no authority to vary the terms of the original written contract, is *held* to be supported by the evidence.

KERWIN and SIEBECKER, JJ., dissent.

APPEAL from a judgment of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

Action to foreclose a mortgage for $800 upon real estate in which it is sought to hold the defendant *Skidmore Land Company,* a corporation, and a grantee of the mortgagor, F. E. Coons, liable for the amount of the mortgage debt. The defendant *Land Company* purchased the land under a written contract wherein it was agreed that, in consideration of certain real estate of the *Land Company* being deeded to F. E. Coons, he would deed the mortgaged premises to the *Land Company* "subject to mortgages amounting to $11,465," among which was the one foreclosed. The deed from Coons to the *Land Company* recited that it was "subject to the following mortgages;" naming, among others, the one sued upon in this action. Neither in the written contract of purchase nor in the deed does the *Land Company* assume and agree to pay the mortgage, but plaintiff maintains that subsequent to the time the written contract was entered into one Hawkins, the agent of the *Land Company,* who was sent to Minnesota to attend to the execution of the transfer of title, orally agreed in behalf of the company to assume and pay the mortgage. It also offered oral testimony tending to show that prior to the execution of the contract of purchase the *Land Company* assumed and agreed to pay the mortgage, but this testimony was excluded by the court because it contradicted the written contract. At the close of the evidence the court directed a verdict in favor of the *Skidmore Land Company* on the ground that oral testimony was inadmissible to vary or contradict the terms of the written contract of purchase and because Hawkins, to the knowledge of Coons, had no authority to vary the terms

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of the written contract. From a judgment entered accordingly the plaintiffs appealed.

For the appellants there were briefs by *L. M. Nelson,* attorney, and *Eastman & Goldman,* of counsel, all of Marinette, and oral argument by *E. C. Eastman.*

For the respondent there was a brief by *Martineau, Evert & Martineau* of Marinette, and oral argument by *P. A. Martineau.*

VINJE, J. The written contract for the exchange of properties was unambiguous and complete in itself. It stated what each party agreed to do in order to secure the conveyance contracted for from the other. The *Skidmore Land Company* agreed to convey to Coons certain real estate in consideration of his deeding to it, subject to the mortgages in suit and others, the land it was to receive. The terms, therefore, upon which it agreed to part with its land and the terms upon which it would receive the Coons land were contractual terms. They constituted the very essence of the contract. It is a familiar rule that the material contractual terms of a written contract, when complete and unambiguous, cannot be contradicted or varied by parol testimony of prior or contemporaneous conversations or agreements. 4 Wigmore, Ev. § 2425; 10 Ruling Case Law, 1021; 3 Jones, Ev. (3 Horwitz, Comm.) § 434. This rule applies as well to the consideration expressed in a writing when that is contractual as to other terms therein. 10 Ruling Case Law, 1044. In land contracts such as the one in question the consideration is a contractual part of the writing. *Jilek v. Zahl,* 162 Wis. 157, 155 N. W. 909.

In deeds and other unilateral contracts where some expressed consideration is essential to give validity to the instrument or to prevent a resulting trust in favor of the grantor and because the instrument does not purport to express the complete contract between parties, a different rule obtains and parol testimony is admissible to show the con-

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sideration actually agreed upon. *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681; *Jost v. Wolf,* 130 Wis. 37 (110 N. W. 232) and cases cited on p. 43; *Kipp v. Laun,* 146 Wis. 591, 600, 131 N. W. 418. But where the written contract is complete and there is nothing in it to suggest that it does not embody the whole agreement between the parties, parol testimony is inadmissible to vary or contradict it. *Cliver v. Heil,* 95 Wis. 364, 70 N. W. 346.

That an agreement to assume and pay a mortgage upon conveyed property is essentially different from an agreement to take title thereto subject to the mortgage is too obvious to need discussion or explanation. Hence an agreement to take title to land subject to a mortgage is varied by showing that the mortgage debt was assumed by the grantee, because it adds a personal liability not present in the original undertaking.

A suggestion is made that the provision in the written contract as to consideration merged in the deed and therefore, since oral testimony is admissible to contradict the consideration expressed in a deed, the testimony offered was erroneously excluded. That the provision as to consideration in the contract did not merge in the deed is ruled in *Butt v. Smith,* 121 Wis. 566, 99 N. W. 328. In that case it was held that the terms of an oral agreement as to consideration did not merge in a deed subsequently executed; that they could be shown by parol testimony, and if they were contradictory to the deed they controlled as to the amount of consideration to be paid for the conveyance. In the present case the amount of consideration was expressed in a written contract and as there expressed was identical with the recital in the deed. It has also been held that an original contract for the exchange of real estate in which each party assumed a mortgage on the property conveyed to him did not merge in deeds subsequently executed which contained no provision for the assumption of the mortgages. *Stockton v. Gould,* 149 Pa. St. 68, 24 Atl. 160. This is on the theory

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that the deed is but a part performance of the contract and that the contractual terms of the latter, conferring valuable rights and forming the consideration upon which it was entered into, control, and do not merge in the recitals of the deed. To hold that the terms of an express written contract as to consideration in pursuance of which a deed is given merge in the deed and become subject to the construction given to terms of mere recitals therein would be to destroy the power of parties to make binding written contracts as to consideration. For example, A. agrees in writing to pay a certain consideration for a deed to a tract of land "subject to a mortgage" and takes a deed subject to a mortgage. Under his contract and deed he has bought the equity of redemption only. He has incurred no personal liability. But if the consideration expressed in the contract merges in the deed, then he obtains no protection from it, for the recital in the deed may be contradicted by parol testimony and it may be shown that he assumed and agreed to pay the mortgage. This is not the law. A material provision in a written contract is not merged in a later contract, which, as to such provision, does not purport to speak contractually, but merely by way of recital in order that its validity may not be questioned because of the absence thereof. Naturally a different rule usually applies to covenants of title. Since it is the express purpose of a deed to pass title and to define the character thereof, its provisions relative thereto, in the absence of fraud or mistake, control when they purport to cover the field of the previous contract.

The finding of the trial court that the agent, Hawkins, sent by the *Land Company* to have the papers executed, had no authority to bind the company by any agreement different from that expressed in the written contract and the written instructions given him, cannot be successfully assailed as against the weight of evidence. It appears that Coons knew that Hawkins had express written instructions to which he frequently referred during their transactions

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to see that he did not overstep his authority. These instructions were such as would be given any clerk sent to secure the transfer of papers in a land deal whose terms had already been agreed upon. They authorized mere ministerial acts. They gave no power to vary the terms of the written contract. So, too, the claim of ratification by the *Land Company* of Hawkins's acts fails, as inferentially found by the trial court.

By the Court.—Judgment affirmed.

KERWIN, J. *(dissenting).* A preliminary land contract was made in this case for the exchange of land in Minnesota for cut-over land in Wisconsin. The Minnesota land was incumbered by mortgages in the sum of $11,465. The amount to be paid the *Skidmore Land Company* was arrived at by deducting the $11,465 incumbrance. A deed was afterwards given and accepted by the *Skidmore Land Company* in consummation of the deal.

It is plain from the deed and the surrounding circumstances shown in evidence that the land contract did not contain all the terms of the agreement. The deed, being the final contract of the parties covering the subject matter of the deal, is controlling. This proposition is elementary.

The parties to the deed cannot escape from its provisions even if the preliminary contract was in conflict with it, which it was not. The contract did not cover the whole agreement. The deed is controlling not only as to its terms but as to its legal effect.

When a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of all the parties. "No rule of law is better settled than that where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio,* and the

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rights of the parties rest thereafter solely on the deed." 2 Devlin, Real Estate (3d ed.) § 850*a*, citing as to quoted matter *Slocum v. Bracy,* 55 Minn. 249, 56 N. W. 826.

Under the deed in question it was competent to show that the *Skidmore Land Company* assumed and agreed to pay the incumbrance. *Strohauer v. Voltz,* 42 Mich. 444, 4 N. W. 461 (opinion by COOLEY, J.), is directly in point. In that case there was a warranty deed and a covenant against incumbrance, "subject to a certain mortgage given by the parties of the first part for one thousand dollars," and it was held that oral evidence was competent to show that the grantee had assumed and agreed to pay the mortgage. This court as well as others has held the same rule. *Herrin v. Abbe,* 55 Fla. 769, 46 South. 183, 18 L. R. A. N. S. 907; *Mueller v. Cook,* 126 Wis. 504, 509, 105 N. W. 1054; *Perkins v. McAuliffe,* 105 Wis. 582, 587, 81 N. W. 645; *Beckman v. Beckman,* 86 Wis. 655, 660, 57 N. W. 1117; *Kickland v. Menasha W. W. Co.* 68 Wis. 34, 31 N. W. 471; *Frame v. Attermeier,* 147 Wis. 485, 133 N. W. 603. *Herrin v. Abbe, supra,* is directly in point. The deed recited a consideration of "$1 and other valuable considerations," and further, "The above property is conveyed subject to all liens and mortgages now standing of record against the same." It was held that oral evidence was admissible to show that the grantee assumed and agreed to pay the incumbrance, and that such evidence did not vary the provision making the conveyance subject to the incumbrances.

The same rule applies to land contracts, and necessarily so, because a contract is no more sacred than a deed. 17 Cyc. 653. In *Witzel v. Zuel,* 90 Minn. 340 (96 N. W. 1124), at p. 342 it is said:

"The court did not err in denying this motion for the very sufficient reason that a portion of the evidence was not objectionable, and it seems also clear that under any circumstances the amount of consideration for the lands designated in the written instruments referred to was not conclusive, but might be shown by parol."

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In *Ryan v. Hamilton,* 205 Ill. 191 (68 N. E. 781), at p. 204 it is said: "It is well settled in this state that the true consideration for a contract or agreement may always be shown, whether one is shown in the contract or not; . . ."

Even if it be conceded that the land contract and the deed executed later are but parts of the same transaction and must be read together the result is the same: (a) because oral evidence was admissible to show other consideration in either contract or deed, and (b) the contract was incomplete, as shown by the deed and surrounding circumstances. In *Jost v. Wolf,* 130 Wis. 37 (110 N. W. 232), at p. 41 this court said:

"Further, appellant urges that the land contract and the deed executed ten days later are but parts of one transaction, and, read together, constitute complete written expression of its terms not subject to variation by parol. This is, however, merely begging the question of fact whether they were parts of one transaction, or whether another transaction took place after the written land contract and the deed was made in execution of such later contract."

There can be no doubt but that the *Land Company* is bound by all the terms of the deed. It accepted and ratified it. It contained terms different and in addition to those specified in the land contract and expressed a consideration of "sixty-eight hundred dollars and other valuable considerations," and also contained a recital that the land was sold "subject to the following mortgages," aggregating $11,465. The "other valuable considerations" can be shown by oral evidence. *Frame v. Attermeier,* 147 Wis. 485, 133 N. W. 603. The amount of consideration mentioned in the deed to Thompson was arrived at by deducting the amount of the incumbrances, $11,465, from the estimated value of the land. Thompson was substituted as grantee in place of the *Skidmore Land Company* by agreement between Coons and Hawkins, who represented the *Skidmore Land Company* in the deal.

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The main contention of counsel for respondent here was that Hawkins had no authority to change the agreement as embraced in the land contract. No change by Hawkins in the land contract was necessary. The consideration in either land contract or deed was open to oral evidence of what the real consideration was. Moreover, the land contract and deed are not in conflict. The contract recites that the Minnesota land was to be sold "subject to mortgages amounting to $11,465, due December 1st, 1916, at 6 %." And the deed recites a consideration of $6,800 subject to mortgages aggregating $11,465.

It seems to me clear that, even construing the land contract and deed together as one agreement, evidence of the real consideration was admissible. The evidence offered to the effect that the *Skidmore Land Company* assumed the incumbrance was not in conflict with any provision of the land contract or deed. It was in harmony with both, especially when viewed in the light of surrounding circumstances and the law that the consideration may be shown to be different from that written in the contract or deed.

The land contract was executed November 15, 1915. On December 14, 1915, the *Skidmore Land Company* informed Coons that it accepted the proposition made November 15, 1915, and three days later Coons wrote the *Land Company* that he had his interest paid to December 1, 1915, and asked that the *Land Company* assume the mortgages from that date. The *Land Company* made no denial of this proposition of Coons that it assume and pay the mortgages, but afterwards sent its manager, Hawkins, to Minnesota to close the deal with Coons. The deal was closed and a consideration of $6,800 agreed upon, and it was further agreed that the conveyance be made to Thompson instead of to the *Land Company,* and that the indebtedness of $11,465 be assumed and paid by the *Skidmore Land Company* as part of the consideration. The evidence also tends to show that in the negotiations between Coons and Hawkins the consideration put

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in the deed, $6,800, was arrived at by a discussion of the value per acre of the respective lands.

It was strenuously urged by counsel for respondent that the *Skidmore Land Company* was not bound by the agreement of Hawkins to assume and pay the incumbrances, he being a special agent. However, Hawkins had authority on behalf of the *Land Company* to close the deal and accept the deed made. He had authority to vary the terms of the land contract, in some particulars at least, and had apparent authority to do all that he did in making the contract. The *Skidmore Land Company* had notice, when it authorized Hawkins to go to Minnesota to close the deal, that Coons understood the incumbrances were to be paid by the *Land Company,* accepted and ratified the deed as made, and cannot question it in this action.

But even though Hawkins had no authority on the part of the *Skidmore Land Company* to make an agreement assuming the incumbrances, still the court below committed prejudicial error in excluding evidence offered to prove that Mr. Skidmore, officer of the *Skidmore Land Company,* who had authority, agreed to assume and pay the mortgages on behalf of the company. This evidence related to the consideration, was competent and vital in tending to establish that the *Land Company* did assume and agree to pay the mortgages. This evidence alone would have been sufficient to carry the case to the jury.

The case here does not fall within the authorities holding that where the stipulation in the deed or contract is contractual it cannot be contradicted or varied by oral evidence. It is wholly immaterial whether the stipulation be in a deed or a land contract; if contractual it cannot be varied. This rule is elementary. But the consideration in either deed or contract may be varied, explained, or even contradicted. This is the situation in the case at bar. *Strohauer v. Voltz,* 42 Mich. 444, 4 N. W. 461; *Herrin v. Abbe,* 55 Fla. 769, 46 South. 183, 18 L. R. A. N. S. 907.

The evidence offered and excluded was consistent with

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both the deed and the land contract, and would not have varied or contradicted any contractual item of either. The evidence offered and excluded was ample to show that it was agreed that the *Skidmore Land Company,* as part of the consideration of the purchase price, assumed and agreed to pay the mortgages on the Minnesota land, and that an injustice was done Coons in excluding the evidence.

I am convinced that the judgment in this case should be reversed, and the cause remanded for a new trial: *First.* The deed of the Minnesota land was the final contract made in consummation of the deal, and oral evidence that the *Skidmore Land Company* agreed to pay the incumbrance was admissible. *Second.* Even if the deed and land contract be read together, the same result follows, because the consideration in the contract as well as the deed could be shown by oral evidence; and if it be admitted that the evidence of Hawkins was inadmissible because he had no authority to make such an agreement, the evidence offered that Skidmore made such an agreement was admissible and should have been admitted. *Third.* Upon all the evidence and surrounding circumstances the agreement that the incumbrance was assumed did not contradict any covenant in the land contract or deed. The evidence offered and excluded went only to the consideration of the deed and contract. *Fourth.* It is plain from the evidence of Hawkins, as well as from the correspondence between the *Skidmore Land Company* and Coons, that the deed of the Minnesota land was made with the understanding on the part of Coons that the incumbrance was to be assumed and paid by the *Land Company,* the deed was made by Coons upon that condition, and the amount of the incumbrance deducted from the agreed value of the land. Under such circumstances the *Land Company* cannot profit by the deed and repudiate the oral agreement. *Hannon v. Kelly,* 156 Wis. 509, 146 N. W. 512; *Corbett v. Joannes,* 125 Wis. 370, 104 N. W. 69; *Kipp v. Laun,* 146 Wis. 591, 131 N. W. 418.

Even if it be conceded that evidence was not admissible

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under the pleadings as framed, the case should be remanded with permission to so amend the pleadings as to permit the issue of reformation of the deed to be litigated so that justice may be done in the case. *Jilek v. Zahl,* 162 Wis. 157, 155 N. W. 909; secs. 2669*a,* 2836*b,* Stats. In my opinion, however, as before observed, no reformation is necessary, and proof of assumption of the mortgages should have been admitted under the issues framed.

The judgment should be reversed, and the cause remanded for a new trial.

I am authorized to say that Justice SIEBECKER concurs in the foregoing dissent.

CITY OF MILWAUKEE, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

January 10—March 4, 1919.

Municipal corporations: Railroads: Viaducts: Construction and maintenance: When viaduct is a new way: Part payment of cost by railroad company: Vacation of part of street: Contracts: Constitutional law: Police power.

1. The viaduct across the Menominee valley constructed by the city of Milwaukee pursuant to ch. 122, Laws 1891, was understood and intended by the legislature, by the city, and by the defendant railway company, whose tracks crossed Muskego avenue in said valley, to be and it constitutes a new way or street; the vacation by the city, in accordance with sec. 8 of said act, of so much of Muskego avenue as was occupied by the yard tracks and right of way of the defendant—thus relieving defendant of a part of its burden of maintaining crossings over said avenue—was in consideration of the payment by defendant of an agreed sum as part of the cost of the viaduct; and the new street was not in any sense an alteration or a substituted way for said avenue. The railway company was not bound, therefore, under the statutes, the common law, or the city charter, to construct said viaduct, and is not bound to maintain or repair it.

. . . . . .

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2. Ch. 122, Laws 1891, authorizing the city to construct said viaduct and to contract with the defendant railway company for payment by the latter of a part of the cost and for vacation of a part of Muskego avenue, did not violate sec. 31, art. IV, Const., as it then stood, and was a valid exercise of the police power to supervise and control thoroughfares in the interest of public safety and convenience.
3. The contract so authorized between the city and the railway company remains subject to legislative control, and the right to exercise the police power of the state on the subject is not bargained away.

WINSLOW, C. J., and KERWIN and ROSENBERRY, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

The case was tried before Judge ORREN T. WILLIAMS, then referred to him as referee after his term had expired. The referee's report having been filed, an order approving it was made and judgment entered dismissing the complaint.

This action was brought by the city of *Milwaukee* to recover from the *Chicago, Milwaukee & St. Paul Railway Company* the amount of money spent by the city in repairing a viaduct across the Menominee valley in the city after the company had refused to do so. The facts material to the controversy are, in substance, as follows:

Muskego avenue was a public street in the plaintiff city before the 17th day of October, 1891, and was a public highway running approximately from what is now the southwest corner of the city, northeasterly to a point where Greenfield avenue and Eleventh avenue cross in the city, then northerly to a point where South Pierce street and Eleventh avenue cross in the city, and then northeasterly across the Menominee valley, intersecting a point where Thirteenth street meets North Canal street in the city. This highway existed before the defendant or its predecessors procured any right of way or laid any tracks in that part of the Menominee valley.

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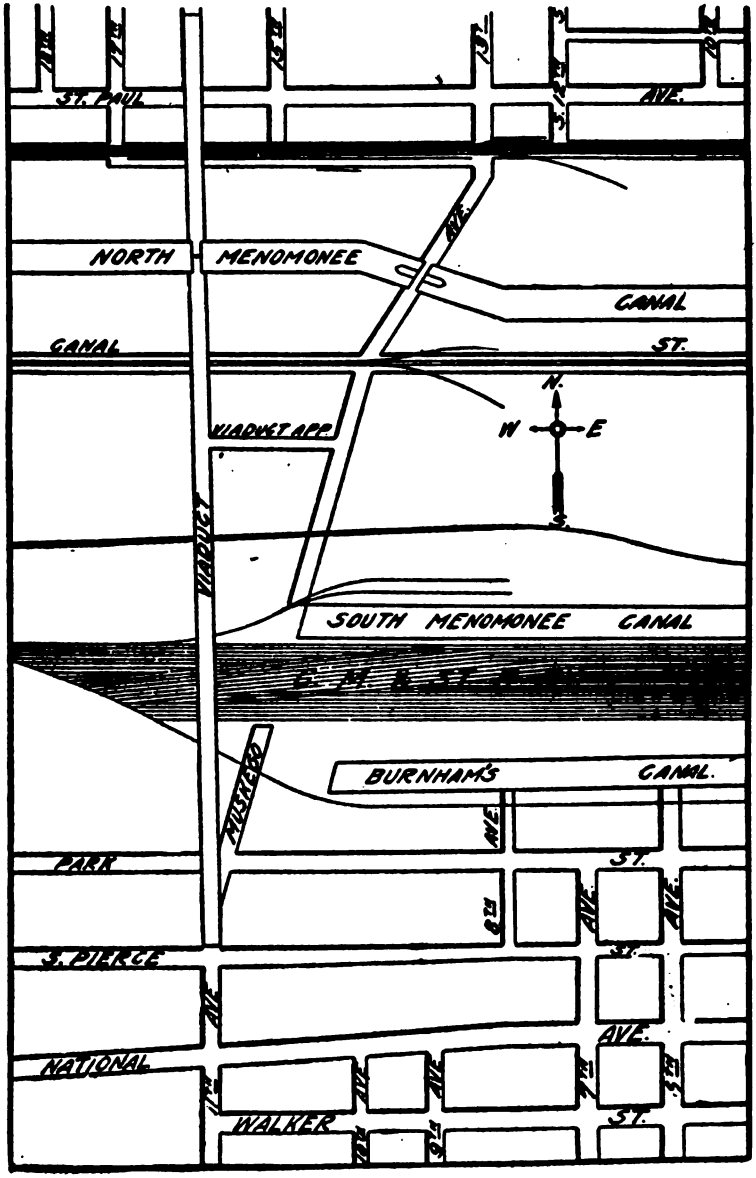

AFTER

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Before the 17th day of October, 1891, the defendant procured the right of way and laid tracks in the Menominee valley crossing Muskego avenue at grade at various places between Park street and the north line of North Canal street. These crossings were dangerous because of their number and because of their close proximity to each other, and because the defendant engaged in almost constant switching and other train operations over the crossings; all of which impaired the usefulness of the street and made it necessary that a viaduct or some other means of separating the railroad from the street be erected.

The legislature of the state of Wisconsin enacted a law, published April 7, 1891, known as ch. 122, Laws 1891, providing for issuing bonds, constructing a viaduct across Menominee valley, and for condemnation of lands therefor.

Under the provisions of the act the plaintiff secured the strip of land mentioned therein at a total cost of $100,454.06 upon which to build a viaduct across the valley. The viaduct was completed in 1895 at a total cost of $298,991.07, of which amount the defendant on October 17, 1891, agreed to pay and later did pay the sum of $125,000, pursuant to a contract made between it and the city under the provisions of the act above mentioned. On July 25, 1895, the plaintiff duly vacated so much of Muskego avenue as was occupied by the yard tracks and right of way of the defendant in accordance with sec. 8 of this act, thus discontinuing Muskego avenue as a street at this point.

In the next fourteen or fifteen years the viaduct became so corroded, weakened, and out of repair that the common council on November 12, 1909, passed a resolution directing the railway company to repair the viaduct, or, in event of its refusal, authorizing the board of public works of the city to proceed with the repair and to determine the proportion of the cost thereof which should be borne by the defendant. The railway company refused to contribute to the repair or reconstruction of the viaduct; the city made the repairs at a

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cost of $98,995.65, which amount the city in this action seeks to recover against the defendant.

For a defense the answer of the railway company alleges that it is not liable for the cost of repairs of the viaduct and that the circumstances existing at the time of the building of the viaduct in 1891 have not materially changed since that date; that under a contract entered into by the city and the railway company under ch. 122, Laws 1891, the defendant is not obligated to contribute towards the expense of the repair of the viaduct; and that the work done by the plaintiff upon the viaduct after November, 1909, was greater and much more expensive than was necessary.

Among other things the referee found:

That Muskego avenue as it existed in 1891 when ch. 122, Laws 1891, was passed, started at the north side of South Pierce street on the hill on the south side of Menominee valley, opposite the north end of Eleventh avenue on the south side of said South Pierce street, and ran northeast across the said valley to the north line of defendant's right of way of its Prairie du Chien division at the foot of the hill on the north side of the valley, and connected with Fowler street, the west side of said avenue coming to the south side of North Canal street about on the west line of said Thirteenth street extended south to said Canal street; that said Muskego avenue, within the termini described, crossed by means of bridges the north Menominee canal and the south Menominee canal, and was crossed on the south side of said valley by defendant's Muskego yards tracks, which covered a space of about 329 feet in width north and south by one track lying 497 feet north of said yard and leading to the plant of the Plankinton Packing Company, by two tracks in South Canal street 773 feet north of the track leading to the plant of the Plankinton Packing Company, by two main-line tracks, part of the Prairie du Chien division of defendant's railroad, 1,150 feet north of South Canal street, and by sidetracks branching from the south main track of its said Prairie du Chien division; that some time after 1891 the bridge carrying Muskego avenue across the Menominee canal was made a bascule bridge by the city; that the north end of Muskego avenue after 1891 was changed, . . .

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and connected with Thirteenth street, and has been so connected ever since the erection of said Sixteenth street viaduct, and ever since the erection of said Sixteenth street viaduct said Thirteenth street and said Muskego avenue have been extensively used by the public as far south as defendant's Muskego yard, and that the *south end* of said Muskego avenue has ever since the construction of said viaduct been extensively used by the public as far north as defendant's Muskego yard; that all that part of Muskego avenue lying north of the defendant's Muskego yard has, ever since the opening of said viaduct for travel, been connected with the viaduct by an inclined bridge or roadway leading from the viaduct down to Muskego avenue, which inclined bridge or roadway for general traffic is located 860 feet north of defendant's Muskego yard and in the middle of the entire length of Muskego avenue extending between South Pierce street on the south and Clybourn street on the north of Muskego valley, and all that part of Muskego avenue from the north side of defendant's Muskego yard to the north end of Muskego avenue has been extensively used by the public continuously since the viaduct was opened for travel; that Muskego avenue for over 3,800 feet, less the 329 feet occupied by defendant's Muskego yard, has ever since the erection of said viaduct been maintained by the plaintiff and used by the public for team and foot traffic the same and to a much larger extent than it ever was before the viaduct was built; that the business places along Muskego avenue are much larger than they were when the viaduct was built, and others are maintained that were not there in 1891, and all are reached by using Muskego avenue and the inclined way connecting the viaduct with Muskego avenue; that the team and foot traffic or travel across defendant's Prairie du Chien division main tracks on the north side of the valley has increased more than fifty per cent. since the building of the viaduct; that South Canal street, which crossed Muskego avenue in 1891, has ever since said date been maintained by the city; that the defendant in 1891 operated in said South Canal street two railroad tracks at the grade of Muskego avenue and has so operated them ever since said date, and that ever since said date Muskego avenue for a distance of over 3,800 feet, or some nine tenths of its entire length, has run along the ground with railroad tracks crossing it at grade north of defendant's Muskego yard, as before the via-

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duct was built; that the grade of Muskego avenue on the hill on the south side of the Menominee valley at the time of the passage of said ch. 122, Laws 1891, was so steep that travel thereon to reach the valley was inconvenient and travel thereon by team with heavy loads was impracticable; that the highway on the hill on the north side of the valley, used to reach the valley, in 1891 was also so steep that travel thereon to reach the valley was inconvenient and travel thereon by teams with heavy loads was impracticable, and there was public necessity for a highway across the valley more suitable and convenient than Muskego avenue as it existed in 1891; that the hills on each side of the valley used in passing to and from the valley were fifty feet higher than the surface of the valley, and that a viaduct across the valley practically on a level with the surface of the hills would, in 1891, constitute a suitable and convenient highway across the valley.

That the Sixteenth street viaduct was built under and pursuant to ch. 122, Laws 1891; that it was the construction of a new way nearly on a level with the top of the banks of the Menominee valley; that it was not contemplated that after the construction of the viaduct Muskego avenue north or south of defendant's Muskego yard would be vacated by the viaduct nor that it would be abandoned; that the viaduct was not intended to and did not alter the course of Muskego avenue without changing its termini and did not straighten out and continue Muskego avenue across the valley on the viaduct, and the said avenue was not in any manner or by any means vacated or changed, except as stated heretofore.

The referee's conclusions of law are:

(1) That the Sixteenth street viaduct across the Menominee valley was intended to be used as a new way or street and was not an alteration of Muskego avenue without changing its termini, and did not vacate that avenue nor contemplate vacating it except through the Muskego yard.

(2) That the plaintiff has no power or authority, by charter or other statute, to compel the defendant to pay any part of the cost of the repairs made by plaintiff to said viaduct, it being a new way.

(3) That ch. 122, Laws 1891, is valid, has not been repealed and is still in force, and the plaintiff is bound by the contract made under it.

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(4) That the plaintiff cannot recover in this action, and that the complaint should be dismissed with costs.

Upon the approval by the court of the report of the referee, judgment was entered dismissing the complaint and awarding costs to the defendant. Appeal is taken from this judgment.

Clifton Williams, city attorney, for the appellant.

C. H. Van Alstine and *H. J. Killilea,* both of Milwaukee, for the respondent.

SIEBECKER, J. The claim is made that the railway company is liable for the cost of maintenance and repair of the viaduct. This presents the question whether the viaduct constitutes an alteration or a changed way of Muskego avenue, which the defendant's railroads cross, or whether it is a new way. The referee and the trial court held that the viaduct is a new way and that the railway company is not obligated to repair and maintain it as a railroad crossing. The city assails this conclusion upon the grounds that the facts and circumstances disclosed by the evidence clearly show that the viaduct constitutes in fact and law a substituted crossing for defendant's railroad crossings over Muskego avenue and hence is not a new way. The physical situation is shown in detail by the facts found by the referee and is set forth in the foregoing statement. It appears that Muskego avenue is an old established highway crossing the Menominee valley and forms the connecting thoroughfare between the city lying on the north of the valley and the portion lying on the south. It crossed the valley in a northeasterly and southwesterly direction, and within its termini was crossed by the north and south Menominee canal bridges, by defendant's yard tracks, industrial and main-line tracks, shown in the detailed statement made above. Prior to 1891 the city and the railway company's representatives had frequent negotiations concerning the public need to make travel across the valley safer and more convenient, but

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failed to consummate and provide a scheme to accomplish this end. Two legislative acts had been passed before the act of 1891 under which this viaduct was built: ch. 476, Laws 1887, entitled "An act to provide for the laying of a highway and the building of a viaduct across the Menominee river," and ch. 231, Laws 1889, entitled "An act to amend the charter of the city of *Milwaukee.*" The first act authorized the construction of a viaduct and provided that the city should build the north and the defendant the south half thereof, if the defendant in writing, within sixty days after its passage, declared its acceptance or rejection of the provisions of the act and complied with its terms. The act also provided for future maintenance of the viaduct by the city and the railway company in the same proportion as was fixed for the original construction. The act makes no reference to provide for altering, changing, or vacating Muskego avenue. Nothing is shown to have been done under this act before ch. 231, Laws 1889, was enacted. This act authorizes the city to acquire by condemnation a strip of land seventy feet wide across the Menominee valley connecting the north and south parts of the city. This strip is located the same as the strip which was acquired under the provisions of ch. 122, Laws 1891, and on which the existing viaduct has been located. The act of 1889 provided that the city use such strip of land for public purposes and specifies, among other things, that the city "may construct, erect and maintain thereon any public bridge or bridges, *viaduct,* abutments, piers or other thing, and improve the same or any portion thereof as a public street or walk, . . ." While nothing was done in constructing the viaduct as provided by these legislative acts, it is manifest that the object was to construct a viaduct across the Menominee valley at the place where the existing viaduct is located. Neither act treated the viaduct as a substitution for or a vacation of Muskego avenue. The viaduct was treated as a separate and independent street to meet the requirements of the public under the changed con-

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dition of travel across the valley. That such legislation was appropriate to enable the city to meet the public needs is recognized in the case of *Bingham v. Milwaukee Co.* 127 Wis. 344, 106 N. W. 1071, wherein ch. 444, Laws 1903, authorizing the construction of "viaducts by counties having a population of 150,000 or more," was considered. The board of supervisors of Milwaukee county acted under this statute to construct a viaduct across the Menominee valley, connecting Grand avenue on the east and west sides of the valley. The basis for such legislation is there well stated in these words:

"That large and populous cities need better, safer, and more expensive highways and bridges for the accommodation of their teeming populations than small communities no one will deny. The simple rural highway and the inexpensive bridge may be ample for all purposes in the village or small city, while for the congested conditions of the great city the asphalt pavement and the broad and expensive bascule bridge may be not only proper, but absolutely essential to human safety."

It is manifest that the city of *Milwaukee* acted under ch. 122, Laws 1891, in building the viaduct in question. The provisions of sec. 31, art. IV, Const., as they stood at the time this chapter was enacted did not prohibit legislation granting special corporate power or privileges to cities or to amend their charters, and hence no objection exists against the provisions of this act as violative of the constitutional provisions. An inspection of the location and nature of the structure and the uses and purposes for which it was built shows that the structure is not a part of nor an alteration of Muskego avenue. Its southern terminus is at the point of intersection of Muskego avenue and South Pierce streets on the hill on the south side of the valley; its course thence is wholly outside of Muskego avenue, and crosses the valley on a line not occupied as a street to a northern terminus, namely, the south end of Sixteenth street, a distance of 4,100 feet, and its northern terminus is 1,300 feet away from the

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northern terminus of Muskego avenue. The viaduct crosses the defendant's Muskego yard tracks 250 feet west of the place where Muskego avenue crossed such tracks. It opened up and furnished a wholly different public street in connection with streets at its termini than does Muskego avenue, and provides a new, improved, safe, and convenient highway to meet the requirements of the new and additional public needs, for which use Muskego avenue was not adapted. It also appears that all of Muskego avenue except the small part which crossed defendant's yard tracks in the south part of the valley was needed and was retained for public use and is now so used, as is specifically shown by the facts stated in the referee's report. The provisions of ch. 122, Laws 1891, authorizing the city to enter into negotiations and to contract with the defendant for part payment of the cost of constructing this viaduct "as shall be agreed upon in consideration of any agreement which shall be made by said railway company in regard thereto, to vacate such portions of Muskego avenue as are occupied by the tracks and right of way of said railway company as shall be desired by said railway company and agreed upon by said city and railway company," thereby relieving the railway company from building viaducts, causeways, or passageways over any part of Muskego avenue so vacated, do not in effect constitute an alteration of this avenue or change or substitute its course to the viaduct provided for by the act. The state proposed to the railway company to vacate a part of the avenue upon the condition that the railway company contribute a sum of money to the construction of the new way. The legislation is manifestly based on the idea that the railway company was not obligated under sec. 1836, Stats., and sub. 48, sec. 3, ch. IV, of the city charter to construct or maintain any part of the new viaduct spanning its right of way and yards in the valley, and that, by consent of the state, the railway company might, for a consideration, be relieved from a part of the burdens of maintaining crossings over Muskego avenue.

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Since the state in the exercise of its police power could regulate these duties as to Muskego avenue, it could properly empower the city to make these proposed arrangements authorized by ch. 122, Laws 1891, to provide new ways for improving public safety and convenience and abandon such Muskego-avenue crossing over defendant's railroad yards. It is within the legislative supervising power and control of public thoroughfares to attain this public purpose in the manner provided. Any contract between the city and railway company for this purpose is subject to legislative control and hence does not bargain away the right to exercise the police power of the state on the subject. As stated in *Chicago, B. & Q. R. Co. v. Nebraska,* 170 U. S. 57, 18 Sup. Ct. 513, "Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health, and morals, and that clause of the federal constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature." *Chicago & A. R. Co. v. Tranbarger,* 238 U. S. 67, 35 Sup. Ct. 678.

The right of this legislative control of this subject is pertinent in ascertaining the legislative intent embodied in ch. 122, Laws 1891. An examination of the provisions of the act, in the light of the condition of the public uses of Muskego avenue and the public necessity of improving the facilities for travel over Menominee valley, clearly indicates that the legislature was impressed that public convenience and necessity required additional facilities for travel across Menominee valley and intended that the city should provide for this need by building the additional street over the new viaduct, and under the state's supervising power the city was authorized to use for this purpose whatever sum of money

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it and the railway company agreed the company should pay for being relieved of a part of its burdens of maintaining crossings upon Muskego avenue, by means of vacating a part of the avenue. We are persuaded that the legislature, the city, and the railway company understood and intended that the viaduct was to be a new street and that the vacation of a part of the avenue was to be in consideration of the railway's agreement to pay the sum agreed upon as part payment of the cost of building the viaduct, and that the new street was in no sense an alteration or substitution of the avenue. The greater part of the avenue still exists and provides a highway for many of the uses to which it was devoted before vacating the part over the yard tracks. The suggestion that the provision of ch. 122, Laws 1891, authorizing an exemption to the railway company from maintaining its yard-track crossing, operates as a substitution and transfer of it to the viaduct is not well founded. As above shown, the provisions of the act fail to disclose any such intent. The viaduct being a new way, the railway company was not in law liable to construct and maintain it as a crossing. It is also plain that the duty of the railway company to construct and maintain highway and street crossings is imposed on them under the police power of the state to secure the public against injury on account of the twofold use of the crossing, and any exercise of the legislative right to provide regulations concerning them is confined to the places which call for the exercise of this power. It is a power which attaches to and is inseparable from the place of crossing. When the public thoroughfare is abolished the duty expires, and is not transferable to a new place unless the new place constitutes in law a substitution of the former crossing. This was evidently the legislative understanding, and hence it authorizes the city to contract with the defendant for vacating Muskego avenue at a crossing upon a consideration to be paid by the railway company for being relieved of this duty. It would be illogical to hold that such

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crossing duty of the railway on Muskego avenue could be transferred to another street and affixed to a place where no such duty exists.

It is considered that Muskego avenue was not altered by the construction of the viaduct upon the lines specified in ch. 122, Laws 1891; that the viaduct constitutes a new way or street across the Menominee valley; and that the railway company was not obligated under the statutes, the common law, or the city charter to construct, maintain, or repair the viaduct spanning its right of way. These conclusions are decisive of the case and elaboration of other points argued is not required.

By the Court.—The judgment appealed from is affirmed.

WINSLOW, C. J. *(dissenting).* The amount involved in the present case is considerable, but the principle involved is of far greater importance. I am so strongly convinced that the public burdens are wrongly distributed by the judgment that I feel it a duty to state the grounds on which that conviction is based.

The fundamental propositions are these: (1) The law contemplates that a railway company crossing a highway shall not impair its usefulness and shall, in case the crossing is thereby made dangerous to life or an obstruction to travel, construct and forever maintain such substituted way or ways as may be best calculated to restore the safety and convenience of the original way. (2) The viaduct in question here is in part (the extent of which part is easily ascertainable) a substituted way for the Muskego avenue crossing which was made dangerous by the defendant's tracks, and hence the defendant should rightfully pay its proportionate share of the cost of repairs of the viaduct.

There will probably be little disagreement as to the first proposition and I shall spend little time on it. Since 1872 the statutes of this state have provided that a railroad company constructing a railroad across a street shall restore the

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same to its former state or to such condition that its usefulness shall not be materially impaired and thereafter maintain the same in such condition against any effects produced by such railroad. Sec. 1836, Stats.

This requirement is, however, but a statutory recognition of a common-law principle which existed long before the passage of our statute. *State ex rel. Minneapolis v. St. P., M. & M. R. Co.* 35 Minn. 131, 28 N. W. 3; *State ex rel. Minneapolis v. St. P., M. & M. R. Co.* 98 Minn. 380, 108 N. W. 261 and cases cited in opinion. This court has approved the doctrine to the fullest extent. *Superior v. Roemer,* 154 Wis. 345 (141 N. W. 250) on p. 356.

The charter of the city of *Milwaukee* (ch. 184, Laws 1874, sub. 48, sec. 3, subch. IV) recognized the principle by giving the city council power "to require railroad companies to construct and maintain at their own expense, such bridges, viaducts, tunnels, or other conveniences, at public railroad crossings, as the common council may deem necessary." Doubtless similar power is conferred by most of the city charters of the state. It is to be found in the general city charter—sub. (51), sec. 925—52, Stats.—and in the special charter of the city of Superior.

The authorities which hold that a city cannot contract with a railroad company to keep such a structure in repair and thus relieve the railroad company from its duty because there is no consideration for such a contract, are numerous and decisive. Furthermore, the question has been directly decided by this court. *Superior v. Roemer, supra,* and authorities there cited, to which may be added *Newton v. C., R. I. & P. R. Co.* 66 Iowa, 422, 23 N. W. 905; *Wabash R. Co. v. Defiance,* 167 U. S. 88, 17 Sup. Ct. 748.

Proceeding to take up the second proposition, I freely admit that the viaduct satisfies and was intended to satisfy certain public needs not resulting from the construction of the railroad or the presence of the tracks. Here was a deep valley, four fifths of a mile wide, containing two canals run-

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ning through the city, and it goes without saying that a viaduct making possible travel at grade between the two parts of the city thus separated is a municipal improvement demanded by considerations of convenience and public welfare whether there is any railroad in the valley or not. But the fact that the viaduct was demanded by and efficiently answers to such needs does not prevent it from answering other needs, *i. e.* the need of a safe crossing in place of the old Muskego avenue crossing. If it does this it is in substance the Muskego avenue crossing changed to a slightly different location, and just so far as it serves the purpose of that crossing the railway company should be required to maintain it. That the city, the railway company, and the legislature all regarded this new way and viaduct as a substitute for the Muskego avenue crossing and deemed that the proportionate share of the whole expense of the viaduct which this substitute justly represented was capable of definite ascertainment, cannot in my judgment be doubted.

The very first act passed by the legislature on the subject (doubtless at the request of the city authorities) conclusively shows that the legislative thought then was that the proposed viaduct was made necessary in part because the defendant's tracks had made it dangerous to use Muskego avenue. This act (ch. 476, Laws 1887) requires the railway company to build the south half of the viaduct simultaneously with the building of the north half by the city, and provides for perpetual maintenance of the same by the railway company and the city in the same proportions. The railway company did not comply with this act and apparently no attempt was made to compel obedience. It is unnecessary to discuss the question here whether obedience could have been compelled or not: the chief significance of the act is that it expressed the judgment of the legislature at that time that the improvement was a joint improvement, to the expense of which the railway company should be required to contribute a just proportion. This could only be on the

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theory that the company had so greatly impaired the usefulness of the Muskego avenue crossing that it became its duty to provide another.

This act having failed of its purpose, ch. 231, Laws 1889, was passed, providing that the city should at once condemn the lands over which the viaduct now passes and should have power to use the lands condemned for a bridge or viaduct and any other proper street. In this act no reference is made to the railway company. Whether it had been concluded by the city that the company could not be compelled to contribute to a viaduct not located on the line of Muskego avenue, or whether it was thought that it would be best to make the Sixteenth street viaduct purely a city enterprise and require the railway company to build a separate viaduct on the line of Muskego avenue, is not clear and probably not important.

At any rate it is certain that in January, 1891, the common council of the city had determined that, if the railway company was not willing to contribute its just share of the expense of the contemplated viaduct at Sixteenth street, it should be compelled to build a separate viaduct at Muskego avenue carrying that avenue over all the company's tracks which crossed the same. This appears from two resolutions passed by the council, the first January 12, 1891, providing for the appointment of a special committee to confer with the officers of the railway company relative to the construction of a viaduct over their tracks in the Menominee valley and as to what proportion of the expense the company would bear, and the second, passed February 9, 1891, directing the railway company to build separate viaducts, with easy approaches and on plans approved by the city engineer, over all its tracks where the same cross Muskego avenue and Thirteenth street.

This was the situation of affairs when ch. 122, Laws 1891, was passed March 30th of that year; the railway company had declined to contribute to the expense of constructing the

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joint crossing at Sixteenth street and had been ordered by the common council to build separate viaducts carrying Muskego avenue over all its tracks. Doubtless the defendant's officers realized that this order was perfectly valid and capable of enforcement. Naturally enough, results began to follow very quickly; the time for delay had passed, and ch. 122, Laws 1891, was placed upon the statute book.

Remembering that the railway company was at that time under order to construct its own viaduct, it becomes entirely plain that the act was the result of negotiation between the city and the company, and it becomes perfectly clear, also, that all parties interested understood that the viaduct authorized by that act was to be in part a substitute for the Muskego avenue crossing and as to such part to be paid for by the railway company. The act shows on its face that in case agreement could be reached between the city and the company as to the just amount which the company should contribute to the expense of the viaduct, so much of Muskego avenue crossed by the tracks as was desired by the company was to be vacated and the crossing abolished, and, as a necessary result, the portion contributed by the railway company to the Sixteenth street viaduct accepted by the public in place of the old Muskego avenue crossing. I shall not attempt to dissect the act in order to demonstrate this. The very careful provisions requiring the vacation of those parts of Muskego avenue as soon as the company had paid its proportion of the expense of the viaduct, and the further provisions formally relieving the company of the duty to build any viaduct over any part of Muskego avenue for all time to come, however great the multiplication of tracks, leave no room for doubt on the point. So far as this crossing is concerned, Muskego avenue was to be transferred to the Sixteenth street viaduct when the arrangements authorized by this act were carried out.

Nor is it difficult to determine how large a portion of the new viaduct is in effect the Muskego avenue substitute cross-

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ing. The city and the company agreed on $125,000 as the just amount which the railway company should pay for its share of the viaduct, and the engineer of the defendant, testifying on the present trial, stated that the cost of the Muskego avenue viaduct ordered to be built in 1891 (exclusive of the drawbridge over the canal) would have been $116,386. Apparently the sum agreed upon quite fairly represented the railway company's share. The proportion which this amount bore to the total cost of the viaduct would in my judgment correctly represent the proportion of the expense of repairs which the railway company should be required to pay. No agreement relieving the company of its obligation to pay this proportion could be made, because not only did the act of 1891 fail to authorize it, but no such agreement would bind the city in any event under the principles already stated.

Our statutes not only allow but provide for making reasonable change in the location of highways and crossings which have been made dangerous or undesirable by the presence of railroad tracks. Sub. (5), sec. 1828, and sec. 1836, Stats.

To my mind that is substantially what was done in the present case by the joint affirmative action of the state, the city, and the company. If so, the viaduct has become in substance the old crossing in a changed location. True, it is more than that: it is also a great municipal improvement demanded by other public needs, but that does not prevent it from being to a definite and ascertainable extent the Muskego avenue crossing in a different location. To hold otherwise seems to me to subordinate the substance of things to mere names.

In my opinion the judgment in this case relieves the company by judicial action of a duty laid upon it not only by the common law but by statute.

KERWIN and ROSENBERRY, JJ., concur in the foregoing dissenting opinion.

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PAHL and another, Respondents, vs. KOMOROWSKI, Appellant.

February 4—March 4, 1919.

Milwaukee civil court: Costs, when not discretionary: Offer of judgment: Trial de novo on appeal: Interest.

1. The special provision in sec. 14 of the Milwaukee civil court act (ch. 549, Laws 1909, as amended by ch. 320, Laws 1913), relating to costs in actions governed by the statutes applicable to justices' courts, is controlling as against the general provision in sec. 24 that costs are in the discretion of the judge before whom the action is tried.
2. Under sec. 3628, Stats., if the plaintiff does not accept an offer of judgment duly made and fails to recover a more favorable judgment, he cannot recover costs made after the making of such offer, but must pay costs so made to the defendant.
3. The fact, in such a case, that the action is tried *de novo* in the circuit court on appeal does not affect the defendant's rights under sec. 3628, Stats.
4. In an action upon an open unliquidated account, the amount of which was fairly open to dispute, where the amount for which judgment was recovered had been tendered to plaintiff before the action was commenced plaintiff was not entitled to interest.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Action on contract. Plaintiffs brought suit in the civil court of Milwaukee county, claiming that the defendant owed $43.65 on account of sale of goods. Prior to the commencement of the action the defendant had sent the plaintiffs a check for $33.15, the amount which he admitted was due plaintiffs. Upon the filing of plaintiffs' complaint the defendant made an offer of judgment in the sum of $33.15 and costs, which offer was refused by the plaintiffs. The defendant in his answer set up the fact that he had attempted to pay the $33.15 by check, but did not plead it as a tender and made no effort to keep the tender good. Upon the trial the court found that the defendant owed $33.15, and upon

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motion ordered judgment for the amount without costs, and judgment was entered accordingly. Plaintiffs appealed to the circuit court for Milwaukee county, the matter was brought on for hearing in the circuit court, and an order was made reversing the decision of the civil court and directing that costs should abide the event of the action. The cause was then placed upon the calendar to be tried as an issue of fact by the court. Upon the trial the circuit court found the amount due to be $33.15, and further found that on May 10, 1916, the defendant mailed his check for the sum of $33.15 to the plaintiffs, who received and returned it, not because of any defect in the check or because of lack of funds to meet it, but for the expressed reason that it was not issued for such an amount as was sufficient to pay what plaintiffs claimed was then due them. In their complaint plaintiffs asked for no interest on any sum. The circuit court directed judgment in favor of the plaintiffs for $33.15, with disbursements and interest, but without costs. Judgment was entered accordingly, and from the judgment so entered the defendant appeals.

The cause was submitted for the appellant on the brief of *F. P. Hopkins* of Milwaukee, and for the respondents on that of *Martin J. Brennan* of Milwaukee.

ROSENBERRY, J. The defendant claims that the judgment appealed from is erroneous for the reason that the allowance or disallowance of costs by the civil court was a matter within the discretion of that court, and the civil court having exercised its discretion and denied the plaintiffs costs, plaintiffs are not entitled to judgment for any greater amount than $33.15.

Plaintiffs claim that, the judgment of the civil court of Milwaukee county having been reversed and the cause tried *de novo* in the circuit court, the matter of costs in that court was within the control of the circuit court and that the judgment is right and should be affirmed.

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The civil court act, being ch. 549 of the Laws of 1909, as amended by ch. 320 of the Laws of 1913, provides:

"Section 24. 1. The prevailing party in any action or proceeding in said civil court shall be entitled to costs, in the discretion of the judge before whom such action or proceeding was heard or tried."

Sec. 14 of the same act provides:

"1. The process, service of the same, appearance, practice, pleadings, proceedings for contempt, trials, judgments by confession, default, or of nonsuit, fees, costs and disbursements, and all the writs, warrants and proceedings in said civil court and in appeals therefrom, shall, except as herein otherwise provided, be governed by the provisions of Title XXVIII of the statutes, as amended, relating to courts of justices of the peace and proceedings therein in civil cases, . . .

"2. Provided, that in all actions and proceedings specified in sections 3572 and 3573, commenced in said court where the amount involved or demanded in the complaint in said action shall exceed the sum of two hundred dollars, except actions for forcible entry and detainer, the practice, pleadings, trials, judgments and proceedings thereafter shall be governed by the provisions of law relating to circuit courts and proceedings therein."

This action manifestly falls within that class which is to be governed by the provisions of the statutes relating to courts of justices of the peace. In the matter of costs there is therefore a clear contradiction between sec. 14 and sec. 24. If it be held that all costs are within the discretion of the judge of the civil court before whom an action or proceeding is tried, the provision of sec. 14 that costs shall be governed by the provisions relating to courts of justices of the peace is of no effect and meaningless.

It must be held that the special provision relating to costs in actions governed by the provisions relating to justices of the peace must control over the general provision contained in sec. 24 that costs are in the discretion of the judge before whom the action is tried. This gives effect to every portion

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of the act and is in accordance with the established canons of construction.

Applying the provisions of the statute embodied in Title XXVIII, we find that sec. 3628 provides that if the plaintiff do not accept an offer of judgment made in accordance with sec. 3627 it shall be deemed withdrawn, and if the plaintiff fail to recover a more favorable judgment than he would have done by accepting the offer he shall not recover costs made after the making of such offer, but shall pay costs so made to the defendant.

The plaintiffs did not in either court recover a more favorable judgment than they would have done had they accepted the offer made in the civil court. They are therefore not only not entitled to any costs, but the defendant is entitled to tax against the plaintiffs costs and disbursements made after the offer. *Kellogg v. Pierce,* 60 Wis. 342, 18 N. W. 848.

The action being on an open unliquidated account, the amount of which was fairly in dispute, and the amount having before the commencement of the action been tendered to the plaintiffs *(Kiefert v. Maple Valley M. H. F. Ins. Co.* 158 Wis. 340, 148 N. W. 864), the plaintiffs are clearly not entitled to interest. If the tender made had been pleaded and kept good as provided by statute, it would have been a complete defense to the entire action. The fact that the action was tried *de novo* in circuit court on appeal does not affect the defendant's rights under sec. 3628, Stats. *Erd v. C. & N. W. R. Co.* 41 Wis. 65; *Kellogg v. Pierce,* 60 Wis. 342, 18 N. W. 848.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in accordance with this opinion.

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ALBRIGHT, Appellant, vs. STEGEMAN MOTOR CAR COMPANY, Respondent.

February 4—March 4, 1919.

Contracts: When parties become bound: Acceptance of order: Waiver of countersignature: Delays in filling order: Waiver: Bailments: Deposits for safe-keeping: Offset against debts.

1. Parties may become bound by the terms of a written contract even though they do not sign it, where their intention to become bound is otherwise indicated.
2. In a written order by plaintiff for a motor truck, to be manufactured by defendant company, a provision that in order to constitute a valid contract the order must be countersigned by an officer of defendant was waived, and the acceptance of the order sufficiently shown, by defendant's retention of a down payment and by the facts that defendant started work on the truck to the knowledge of plaintiff, who himself worked on it as an employee in defendant's factory, that delay in its completion was the subject of frequent complaint and discussion, and that plaintiff took the truck out on trial trips. *Consolidated W. P. Co. v. Nash,* 109 Wis. 490, distinguished.
3. The defendant in such case, having become bound by the contract, acquired the right to enforce it against the plaintiff.
4. Even if time was of the essence of a contract for the building of a truck to be delivered to plaintiff on or about April 1st, that feature was waived by plaintiff serving notices requiring delivery by certain later dates, and by his agreement on May 7th that if delivery was made by May 12th he would be satisfied. He could not rescind such last-mentioned agreement on May 10th.
5. In an action to recover moneys which plaintiff had deposited with defendant not as payments on the truck but for safe-keeping only, it being found that the amount thereof was due to defendant on the purchase price of the truck, it was proper for the trial court so to apply it and end the controversy.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The respondent is a manufacturer of motor cars and trucks at Milwaukee. On the 26th day of February, 1917, appellant ordered, in writing, from the respondent a motor truck, to be built according to specifications, and agreed to

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pay therefor the sum of $4,500. The order contained this clause: "This proposal, if accepted, constitutes a contract, subject to the approval of the *Stegeman Motor Car Company,* at its offices in Milwaukee, and must be countersigned by an officer of the company to be valid and in force." The proposal was never so countersigned. Appellant, however, paid $450 at or about the time of signing of the order, which sum was accepted by the company. The company entered upon the building of the truck, and plaintiff and appellant, shortly after the giving of the order, secured employment in the factory of the company, and a great portion of his time was spent in work upon the truck which he had ordered. The order required the truck to be delivered on or about April 1st. It was not completed April 1st nor for some time thereafter. On the 7th day of April appellant served written notice on the company that unless the truck was completed and delivered on the 25th day of April the order would be canceled. On the 11th day of April he served upon the company another notice that unless the truck was delivered, complete, April 30th the order would be canceled. On the 7th day of May the truck had not been completed nor delivered. On that day a controversy took place between appellant and officers of the *Motor Car Company* because of the nondelivery of the truck, which resulted, according to respondent's testimony, in an agreement on the part of appellant that if the truck should be delivered on the 12th of May, in lead paint, he would be satisfied. He was at that time working in the factory and continued to work therein until the 10th day of May, when he left. At the same time he notified the company of his cancellation of the order for the truck. The company refused to accept or honor the cancellation and, having completed the truck on the 12th day of May, as per the claimed agreement on the 7th, held plaintiff for the purchase price thereof.

According to the terms of the written order $2,100 was to be paid at the time of delivery of the truck. On the 14th

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day of March, 1917, appellant, having $500 which he did not want to retain in his possession, deposited the same with the *Stegeman Motor Car Company* and took its receipt therefor, and on the same date deposited in like manner $1,150 more. Upon cancellation of the order for the truck appellant demanded of the company the $1,650 so deposited, claiming that it held the same as bailee. The company refused to pay back the money, claiming that it had been paid to apply upon the purchase price of the truck.

Appellant thereupon commenced an action in the civil court of Milwaukee county to recover the $1,650 so deposited. The question litigated was whether the company held the money as bailee and was guilty of a conversion thereof by its refusal to return the same upon demand, or whether it had been paid by appellant to apply upon the purchase price of the truck.

The case was tried by the court without a jury. The court found that the plaintiff placed said sum of $1,650 with the defendant for safe-keeping and that the defendant without the consent of the plaintiff converted the same to its own use; but that the *Motor Car Company* was entitled to have said sum offset against the amount then due it from appellant by reason of the completion of the truck, and rendered judgment dismissing plaintiff's complaint. From this judgment plaintiff appealed to the circuit court for Milwaukee county, where the judgment was affirmed, and from the judgment of the circuit court affirming the judgment of the civil court plaintiff brings this appeal.

For the appellant there was a brief by *Gugel & Kline* of Milwaukee, and oral argument by *F. H. Gugel.*

For the respondent there was a brief by *N. L. Baker & W. J. Zimmers* of Milwaukee, and oral argument by *Mr. Baker.*

OWEN, J. Appellant contends that the judgment of the civil court should have been reversed because there never

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was a valid contract for the manufacture and sale of the truck, for the reason that the written order therefor was never countersigned by an officer of the company as required by its express terms. It is quite fundamental that parties may become bound by the terms of a contract even though they do not sign it, where their intention to do so is otherwise indicated. Manifestly the provision requiring the order in question to be countersigned by an officer of the company was inserted for the benefit of the company, and to prevent its liability thereon until ratified by some one occupying a position of responsibility with the company. If a contracting party may be bound on a contract by acts evidencing an intent to that end, we see no reason why the provision here under consideration could not be waived, nor why the company could not by its acts accept the order, or become estopped to deny its binding force. If the company became bound upon the contract so that it could not resist its enforcement by appellant, it acquired the right to enforce it against appellant.

Conceding that the order was never countersigned by an officer of the company as required by its terms, the inquiry is whether the company otherwise became bound thereon. It is undisputed that shortly after the date of the order the company started work on the truck to be delivered in fulfilment thereof; that appellant was cognizant of the fact; that he secured work in the factory in order that he might work on "his" truck and become familiar with its construction; that delay in its completion was the subject of frequent complaint and discussion, and that he even had the truck out on trial trips. If this is not sufficient to indicate an acceptance of the order by the company, the receipt and retention by it of $450 down payment is certainly sufficient to estop it from denying its acceptance of the order. *Hoyt v. Schillo M. S. Co.* 185 Ill. App. 628; *McKeage v. Scully-Kostner C. Co.* 185 Ill. App. 122; *Edwards v. Gildemeister,* 61 Kan. 141, 59 Pac. 259; *Babbit v. Central L. Ins. Co.* 93 Kan. 564, 144 Pac. 837.

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Appellant relies upon *Consolidated W. P. Co. v. Nash,* 109 Wis. 490, 85 N. W. 485, in support of the contention that the contract never became effective. There the contract provided that it should not be binding upon any or either of the parties until signed by certain persons and corporations. Before it was so signed, and consequently before it became operative as to any, one of the signers withdrew. The court held that until the agreement was signed by all contemplated by its terms it was an incomplete instrument; that no one who had signed it was irrevocably committed to his decision to become a party thereto and was at liberty to change his mind and withdraw therefrom. *Hodge v. Smith,* 130 Wis. 326, 110 N. W. 192, is much to the same effect. The situation presented in the water-power case is neither the same nor similar to the situation here. It was not suggested in that case that the parties failing to sign had become bound by the terms of the contract in any other manner than by signing. Had their conduct with reference to the contract indicated their intention to be bound by it, or been such as to estop them from denying their liability under it, it would have a more direct bearing upon the question considered here. But, for the reason stated, it furnishes no authority for appellant's contention.

Appellant further contends that he is not liable for the value of the truck because time was of the essence of the contract; that the truck was to be delivered April 1st; that it was not completed or delivered on May 10th, on which date he rescinded the contract; and that, instead of being liable for the purchase price, he was entitled to recover back what he had paid thereon. Granting that time was of the essence of the contract, this feature was waived by his notice of April 4th requiring delivery on April 25th; by his notice of April 11th requiring delivery April 30th; and by his agreement of May 7th that if the truck were delivered to him in lead paint on May 12th he would be satisfied. Having agreed on May 7th that he would be satisfied with

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a delivery on May 12th, he could not rescind on May 10th. *Phillips v. Carver,* 99 Wis. 561 (75 N. W. 432), at p. 575.

The court found that the truck was completed May 12th. Under the terms of the contract $1,650 of the purchase price thereupon became due. While the court found that the $1,650 had been deposited with the company for safe-keeping and that the company had converted the same, it also found that $1,650 was due the company from the appellant to apply on the purchase price of the truck. Under such circumstances it was the duty of the court to offset the one against the other and end the controversy. Secs. 2610, 2836*b*, Stats. In rendering judgment dismissing the complaint effect was given to the legislative as well as judicial policy of this state that litigation should be ended and not protracted.

By the Court.—Judgment affirmed.

YELLICK, Appellant, vs. MILWAUKEE NORTHERN RAILWAY COMPANY, Respondent.

February 4—March 4, 1919.

Street railways: Injury to workman near track: Failure to see approaching car: Contributory negligence.

A laborer employed in the laying of a cement sidewalk, while engaged in wheeling concrete from a mixer placed in front of the premises and near street railway tracks, was injured, as he stood between the handles of his wheelbarrow near the mixer, by a street car which struck such handles. He had been working at this job for three days and knew that cars passed frequently. Nothing had occurred at the time of the accident to divert his attention and, his view being unobstructed, if he had kept a proper lookout as he proceeded from the curb to where he stood he would have seen the car approaching. *Held,* that he was guilty of contributory negligence precluding a recovery. OWEN, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

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This is an action to recover damages for injuries alleged to have been received by the plaintiff through the negligence of the defendant.

Yellick, a man fifty-six years of age, was a laborer employed on July 14, 1916, by Michael Byrne & Brothers Company, cement contractors. On the date above mentioned the Byrne Company was engaged in laying a cement sidewalk at certain premises on the west side of Sixth street, between Chestnut and Prairie streets, in the city of Milwaukee. A concrete mixer had been placed in the street in front of the premises, and it was part of the plaintiff's duty to wheel the mixed cement from this machine by means of a wheelbarrow over a temporary board walk and onto the premises, and while performing this duty he at times came close to the west or south-bound track of the street railway company. The plaintiff had taken a position near the mixing machine preparatory to getting a load in his wheelbarrow and was standing between the handles at the time, when the handles of the barrow were struck by a street car. The plaintiff claims that he suffered great injuries from the accident, and alleges that the accident was due to carelessness and negligence on the part of the motorman of the defendant company.

It appears that the work at which the plaintiff was engaged had been conducted for two days preceding the accident; that the job was to be completed during the afternoon of the day the accident occurred. William Hein, in charge of the work, stated that the concrete mixer stood two and one-half feet from the street-car tracks; that the car struck the handles of the barrow; that plaintiff was turning and was going to lift the wheelbarrow; that plaintiff was then in the path of the car; that no bell was sounded, and that the car was going at "a pretty good gait; it was about the speed they usually go along the street."

At the close of plaintiff's testimony the trial judge, on motion of the defendant, awarded a nonsuit and costs against the plaintiff. From this judgment an appeal is taken.

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George A. Bowman, attorney, and *Horace B. Walmsley,* of counsel, both of Milwaukee, for the appellant.

For the respondent there was a brief by *Bottum, Bottum, Hudnall & Lecher,* and oral argument by *F. L. McNamara,* all of Milwaukee.

SIEBECKER, J. Plaintiff testified that he had worked at this job three days; that he knew the cars passed the place frequently while he was there. He stated that on the occasion in question he passed over the plank from the curb towards the mixer, pulling the wheelbarrow behind him by its two handles; that he looked to the north on Sixth street before he reached the mixer at a point about eight feet from the car tracks and saw no car; that his view was unobstructed (a distance of about 340 feet); that he went down the plank and to a point near the track; that he dropped the barrow handles, turned around, stooped over to grasp the barrow handles to push it forward, when he was hit by the street car and injured. He testifies that the mixer was about five feet eight inches in height at its highest point and that it did not prevent his seeing the approaching car from where he was working. It is also undisputed that the barrow had to be moved about six feet from the car track from where he stood to place it under the spout of the mixer. He testifies that he did not look to observe an approaching car when he stepped into the zone of danger nor when he stopped, turned around, and stooped to grasp the barrow handles to push it forward under the mixer spout.

Plaintiff's evidence shows that he could see the approaching car at all times on his trip from the curb to the place he stopped near the track to turn around. It is obvious that the car which hit him was near him and that he necessarily would have seen it had he looked before he stepped into the zone of danger or after he had entered it. It is also undisputed that nothing occurred to divert his attention or to prevent him from seeing the approaching car had he looked

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while he traveled the last eight feet of his trip, nor did his duties so engage him as to prevent him from looking for the car. The evidence permits of no inference other than that he must have seen the car approaching him if he kept a proper lookout as he proceeded from the curb to where he stopped or that he omitted to pay any attention to it. The failure to do either, under the facts and circumstances adduced by the evidence, is *per se* negligence on his part which manifestly contributed to produce the accident. *Meissner v. Southern Wis. R. Co.* 160 Wis. 507, 152 N. W. 291; *Bubb v. Milwaukee E. R. & L. Co.* 165 Wis. 338, 162 N. W. 180; *Cowley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179.

The contention that the evidence here presents a case of the class typified by *Turtenwald v. Wis. Lakes I. & C. Co.* 121 Wis. 65, 98 N. W. 948, and *Dinan v. Chicago & M. E. R. Co.* 164 Wis. 295, 159 N. W. 944, is not sustained. In the *Turtenwald* and *Dinan Cases* the plaintiffs at the time of injury were engaged at their work, located in the place of danger, and their attention, when directed to their tasks, necessarily prevented them from readily observing and seeing the impending danger and avoiding it. That is not the fact here; the plaintiff, as shown by the undisputed evidence, was not prevented from looking and seeing the approaching car, nor was his engagement such as to hinder him from using his senses to observe that he was in the zone of danger and in imminent peril of being hit by the car.

By the Court.—The judgment appealed from is affirmed.

OWEN, J. *(dissenting).* In *Dinan v. Chicago & M. E. R. Co.* 164 Wis. 295, 159 N. W. 944, it was said:

"A man who is engaged in work upon the highway cannot, if he performs his duty, spend a large part of his time in looking for the approach of street cars or other vehicles. In a busy street he would accomplish little if he did so. Of course he cannot let his thoughts go wool gathering and expect all users of the highway to give place to him; he

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must exercise some vigilance; he must keep that lookout for vehicles which an ordinarily careful man similarly situated would keep; a man who is compelled to be in the street and to be giving attention to his work. Such care must manifestly be a lesser degree than the care required of a person who is on the highway for the purpose of travel alone and may come and go at will."

In my opinion that principle rules this case. Plaintiff was wheeling concrete from a mixer stationed in the street, in close proximity to the street-car tracks, to the abutting lot. A plank sixteen feet long extended from the curb to within twenty inches of the street-car track. He wheeled the concrete over this plank. In order to get on or off this plank with his wheelbarrow he was obliged to enter upon the street-car track. At the time of the accident he was returning to the concrete mixer to have his barrow filled, after having delivered a barrow full upon the adjacent lot. As he was going down the plank he looked to the north and saw no car. He proceeded down the plank pushing the wheelbarrow ahead of him; at the end of the plank he turned the wheelbarrow around and pushed it towards the concrete mixer, where he set it down to be filled, standing between the handles. He was out of the way of the street car, but the handles between which he stood were struck by the street car and the handles threw him to the ground.

When it is considered that he looked for a car when he came down the plank; that running at the rate of fifteen miles an hour a car would reach the mixer within approximately fifteen seconds after it came into view; that his attention was necessarily engaged in the matter of properly placing his barrow to receive the concrete from the mixer; that he himself was out of the zone of danger; that he was probably unconscious of the fact that the handles extended within the pathway of the car; that this mixer had been in the same place for three days; that its presence there was presumably known to the motorman, and that he had a right to rely on warnings of the approach of the car *(Forrestal v.*

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Milwaukee E. R. & L. Co. 119 Wis. 495, 97 N. W. 182), it is my opinion that his negligence was a question for the jury.

VOGEL, Respondent, vs. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Appellant.

February 4—March 4, 1919.

Carriers: Loss of goods in transit: Liability of initial carrier: Evidence: Value: Consular invoice: Proof of execution: Presumptions: Burden of proof as to cause of loss: Declarations by agent.

1. In an action under the federal statute against the initial carrier for damage in transit to goods described in the bill of lading as being in apparent good order, the evidence is *held* sufficient to show delivery of the goods to defendant at New York in good condition and that they arrived in Milwaukee in bad condition.
2. A consular invoice, duly issued and certified in accordance with the federal statutes, was admissible in evidence under secs. 4148, 4164, Wis. Stats., and was at least presumptive evidence of the value of goods which, during the transit, had been abstracted from the package.
3. Sec. 4192, Stats., making written instruments purporting to be signed or executed by any person proof that they were so signed or executed until denied, applies to signatures of persons not parties to the action.
4. In an action under the federal statute against the initial carrier for damage to goods in transit, the defendant is liable for all intermediate carriers until the goods are received at their destination, including, in this case, a bonded cartage company which delivered the goods to the customs warehouse at their destination.
5. When in such an action it is shown that the goods have not been delivered to the consignee the presumption arises that they have been lost through negligence of the initial carrier or its agents, and the burden of proof is upon such carrier to show that the loss resulted from some cause for which it is not responsible.
6. Declarations made by an agent during the transaction of business by him for his principal, in relation to such business and within the scope of his agency, are admissible in evidence as against the principal.

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APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Pereles, Strouse & Carter* of Milwaukee and *Adams, Follansbee, Hawley & Shorey* of Chicago, attorneys, and *Nathan Pereles, Jr.,* of Milwaukee and *Samuel Adams* and *John E. Gavin* of Chicago, of counsel; and for the respondent on that of *Lines, Spooner & Quarles* of Milwaukee.

KERWIN, J. This action was brought to recover damages for goods in transit. The court below found that the goods described in the invoice were packed at Frankfort, Germany, and that the value was as shown in the invoice; that the goods were received by defendant at Hoboken, New Jersey, in good condition and delivered in bad condition by the United States government in Milwaukee; that goods were abstracted from the package between Hoboken and Milwaukee. The evidence shows that the consignment of goods was shipped from Germany to Milwaukee, and delivered to the defendant as initial carrier at Hoboken, New Jersey. The answer admits that one Lang of the city of New York delivered to defendant at Hoboken, New Jersey, a certain consignment of freight shipped *via* defendant's connecting line to Milwaukee, Wisconsin, but denies knowledge as to value of the goods and that damage was sustained to the goods in shipment.

The record shows that defendant issued a bill of lading for four cases of linens bearing certain numbers "in apparent good order except as noted (contents and condition of contents of packages unknown)." There was no notation of bad condition. The goods were consigned to M. J. Hogan of Milwaukee, who was custom-house broker at the port of Milwaukee. It further appears from the record that only one of the cases, numbered 7815, was opened at the customs warehouse at Milwaukee by the custom-house storekeeper, whose duty it was "to keep a record of the merchan-

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dise as it arrives, as it leaves, to receipt for goods arriving according to their condition." It further appears that when the goods were opened at Milwaukee package number 7815 contained one pasteboard box, which was torn out at the top, and that a number of packages were missing and the lower part of the package also was missing, and in comparing the contents with the consular invoice all of the articles in the invoice were not found in the box. The box also showed slits, indicating it had been opened. Other packages were in good condition. It also appears that the goods were consigned in bond to Hogan for clearance and distribution at the port of Milwaukee.

The contentions of defendants are: (1) that the plaintiff did not prove delivery to the defendant at New York in good condition; (2) that the plaintiff did not prove arrival at Milwaukee in bad condition; (3) that plaintiff did not prove value of the goods abstracted; (4) that plaintiff did not prove that the goods were not abstracted by the bonded cartage company at Milwaukee; (5) improper admission of evidence.

The action was brought under the federal statute commonly known as the Carmack amendment (38 U. S. Stats. at Large, 1196, ch. 176), which so far as material here provides:

"That any common carrier, railroad, or transportation company . . . receiving property for transportation from a point in one state . . . to a point in another state . . . shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; . . . Provided further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law. . . ."

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The plaintiff offered in evidence a consular invoice issued and certified December 9, 1914, at Frankfort, Germany, by the American consul general. This certificate shows that the prices given in the invoice agreed with the actual market value or wholesale prices of the merchandise described in the invoice in the markets of the country at the time of exportation, and was made in pursuance of sec. 4 of the act of Congress of June 10, 1880 (21 U. S. Stats. at Large, 173, ch. 190: 2 Fed. Stats. Ann. 713), which reads as follows:

Quadruplicate invoices. "That sections twenty-eight hundred and fifty-three and twenty-eight hundred and fifty-five of the Revised Statutes of the United States be, and the same are hereby, so amended as to require that all invoices of merchandise imported from any foreign country and intended to be transported without appraisement to any of the ports mentioned in the seventh section of this act shall be made in quadruplicate; and that the consul, vice-consul, or commercial agent, to whom the same shall be produced, shall certify each of said quadruplicates under his hand and official seal in the manner required by section twenty-eight hundred and fifty-five of the Revised Statutes, and shall then deliver to the person producing the same two of the quadruplicates, one to be used in making entry at the port of first arrival of the merchandise in the United States, and one to be used in making entry at the port of destination, file another in his office, there to be carefully preserved and as soon as practicable transmit the remaining one to the collector or surveyor of the port of final destination of the merchandise."

The federal act under which the goods were entered—Act of June 10, 1890 (26 U. S. Stats. at Large, 131, ch. 407: 2 Fed. Stats. Ann. 611)—provides that the invoice shall contain a correct description of the merchandise and cash value and shall be made out in quadruplicate, and that the invoice shall be produced before the consul of the United States government in its office in Frankfort, and shall have indorsed thereon a declaration showing that the invoice is

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in all respects correct and true, and provides (sec. 5) for a declaration accompanying the invoice as follows:

"That whenever merchandise imported into the United States is entered by invoice, one of the following declarations, according to the nature of the case, shall be filed with the collector of the port, at the time of entry by the owner, importer, consignee, or agent; which declaration so filed shall be duly signed by the owner, importer, consignee, or agent, before the collector, or before a notary public or other officer duly authorized by law to administer oaths and take acknowledgments, who may be designated by the secretary of the treasury to receive such declaration and to certify to the identity of the persons making them, under regulations to be prescribed by the secretary of the treasury; and every officer so designated shall file with the collector of the port a copy of his official signature and seal . . ."

Sec. 2855, R. S. U. S. (2 Fed. Stats. Ann. 660) provides:

Indorsement upon invoice. "The person so producing such invoice shall at the same time declare to such consul, vice-consul, or commercial agent the port in the United States at which it is intended to make entry of merchandise; whereupon the consul, vice-consul, or commercial agent shall indorse upon each of the triplicates a certificate, under his hand and official seal, stating that the invoice has been produced to him, with the date of such production, and the name of the person by whom the same was produced, and the port in the United States at which it shall be the declared intention to make entry of the merchandise therein mentioned. The consul, vice-consul, or commercial agent shall then deliver to the person producing the same, one of the triplicates, to be used in making entry of the merchandise; shall file another in his office, to be there carefully preserved; and shall, as soon as practicable, transmit the remaining one to the collector of the port of the United States at which it shall be declared to be the intention to make entry of the merchandise."

Sec. 2862, R. S. U. S. (2 Fed. Stats. Ann. 662) provides:

Consuls to exact proof of invoice. "All consular officers are hereby authorized to require, before certifying any invoice under the provisions of the preceding sections, satis-

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factory evidence, either by the oath of the person presenting such invoices or otherwise, that such invoices are correct and true. In the exercise of the discretion hereby given, the consular officers shall be governed by such general or special regulations or instructions as may from time to time be established or given by the secretary of state."

Due proof was made in accordance with the foregoing statutes.

Other federal statutes provide penalties for failure to properly perform duties and making of false invoices. All of the federal enactments show that the duty prescribed is official and the public documents made and kept pursuant to official duty and are admissible in evidence. The Wisconsin statutes made such documents admissible in evidence. Secs. 4148, 4164, Stats.

Our statute, sec. 4192, also makes written instruments purporting to be signed or executed by any persons proof that they were so signed or executed until denied.

Counsel for appellant contends, however, that this statute last referred to does not apply to signatures of persons not parties to the action. This court has held otherwise. *Milwaukee T. Co. v. Van Valkenburgh,* 132 Wis. 638, 112 N. W. 1083; *Parroski v. Goldberg,* 80 Wis. 339, 50 N. W. 191; *Schlei v. Struck,* 109 Wis. 598, 85 N. W. 430; Jones, Ev. § 520; 17 Cyc. 306; 3 Wigmore, Ev. § 1630.

The value of the goods in this case is established, at least *prima facie,* by the consular invoice. Sec. 2852, R. S. U. S. (2 Fed. Stats. Ann. 659), which reads as follows:

"When any merchandise is admitted to an entry upon invoice, the collector of the port in which the same is entered shall certify the same under his official seal; and no other evidence of the value of such merchandise shall be admitted on the part of the owner thereof, in any court of the United States, except in corroboration of such entry."

The defendant receipted for case number 7815 in apparent good condition, and the proof was ample to show that it was in bad condition when received at the custom house in Mil-

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waukee, and that it had been opened and some of the goods abstracted.

It is also contended by appellant that the Quick Delivery Company, which had charge of the goods before delivery to Hogan, was not the agent of the defendant. This contention is unsound. The defendant is liable for all intermediate carriers until the goods are received at their destination. The goods were delivered by the Quick Delivery Company, as agent of the defendant, to Hogan, and Hogan receipted for them in bad order. *Fasy v. International N. Co.* 77 App. Div. 469, 79 N. Y. Supp. 1103; affirmed on appeal, 177 N. Y. 591, 70 N. E. 1098; *Wegener v. C. & N. W. R. Co.* 162 Wis. 322, 156 N. W. 201; *Atlantic C. L. R. Co. v. Riverside Mills,* 219 U. S. 186, 31 Sup. Ct. 64.

The proof in this case was ample to make out a *prima facie* case under the federal decisions as well as our own. *Laughlin v. C. & N. W. R. Co.* 28 Wis. 204; *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, 136 N. W. 794; *L. Struebing Co. v. Merchants D. T. Co.* 142 Wis. 657, 126 N. W. 21; *Uber v. C., M. & St. P. R. Co.* 151 Wis. 431, 138 N. W. 1.

It is further contended that the letters of McDowell to Hogan respecting the subject matter of the shipment were not competent, because McDowell's evidence was not a part of the *res gestæ,* hence not admissible, and that McDowell had no authority to bind his principal by his declarations. The declarations made by the agent in this case were made during the transaction of business by the agent for the principal and in relation to such business and within the scope of his agency, and we are of opinion that the evidence was admissible. Jones, Ev. § 255; *Dean v. T., St. L. & W. R. Co.* 148 Mo. App. 428, 128 S. W. 10; *Quanah, A. & P. R. Co. v. Galloway* (Tex. Civ. App.) 154 S. W. 653; *Louisville & N. R. Co. v. E. J. O'Brien & Co.* 168 Ky. 403, 182 S. W. 227; *Pennsylvania R. Co. v. Orem F. & P. Co.* 111 Md. 356, 73 Atl. 571; *Hill v. Adams Exp. Co.* 77 N. J. Law,

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19, 71 Atl. 683. But whether the letters of McDowell were competent or not is immaterial. The evidence, even if incompetent, was not prejudicial, because the case was tried by the court, the evidence undisputed and ample to make a *prima facie* case without the McDowell letters.

In the instant case there can be no doubt but that a *prima facie* case was made on all points necessary to sustain the findings of the court below. *St. Louis, I. M. & S. R. Co. v. Hudgins P. Co.* 118 Ark. 398, 177 S. W. 400; *National E. Co. v. G. N. R. Co.* 137 Minn. 217, 163 N. W. 164.

In *Galveston, H. & S. A. R. Co. v. Wallace,* 223 U. S. 481, 32 Sup. Ct. 205, which case arose under the Carmack amendment, at page 492 the court said:

"Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy, or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof the plaintiffs were entitled to recover, and the judgment is affirmed."

We are convinced that the judgment below is right and should be affirmed.

By the Court.—Judgment affirmed.

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QUASS, Respondent, vs. MILWAUKEE GAS LIGHT COMPANY, Appellant.

February 6—March 4, 1919.

Negligence: Escape of gas: Explosion: Liability of gas company: Res ipsa loquitur: Verdict based on conjecture: Evidence: Conclusiveness.

1. In an action for injuries caused by an explosion of gas which had escaped into the basement of a dwelling house there was no evidence showing or tending to show that the gas escaped from any pipe or appliance under the control of the defendant gas company or that there was any negligence on defendant's part; and, it appearing that the gas might have escaped from pipes and appliances not under defendant's control, the doctrine of *res ipsa loquitur* does not apply so as to show liability of the defendant.
2. A verdict based on mere conjecture cannot stand.
3. Testimony which is uncontradicted, not against established facts or reasonable probabilities, and in no way discredited must be accepted as true by the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Reversed.*

For the appellant there was a brief by *Miller, Mack & Fairchild,* and oral argument by *J. G. Hardgrove,* all of Milwaukee.

For the respondent there was a brief by *Julius E. Kiefer,* attorney, and *Horace B. Walmsley,* of counsel, both of Milwaukee, and oral argument by *Mr. Walmsley.*

KERWIN, J. This action was brought to recover for personal injuries and loss of property occasioned by an explosion in February, 1917, causing a fire in the dwelling house of one Mrs. Henn, where plaintiff roomed and boarded, at No. 1129 Twenty-first street, in the city of Milwaukee. The dwelling house in question was a two-story building, the first floor being occupied by Mrs. Henn and the second floor rented. Gas was conducted from the street

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main into the basement by a single service pipe. The jury found that gas escaped into the basement from pipes or appliances under the defendant's control and that the explosion resulted from such escape of gas. The main contention of the appellant is that the findings of the jury are unsupported by the evidence, and that a verdict for defendant should have been directed.

Plaintiff testified that when he opened the door leading to the basement with a lighted lamp in his hand the explosion occurred. The uncontradicted evidence shows that the building in question was a two-story building resting upon posts, the basement being merely boarded up; that there was one service pipe leading from the street connected to two meters, one for each floor; that the explosion occurred on Monday morning; that there was no noticeable odor of gas in the house Sunday at 10 a. m.; that no proof as to presence or absence of gas odor in any part of the basement after Sunday at 10 a. m. was made and no noticeable odor of gas on the first floor Sunday evening at 8 o'clock; that there is no proof as to when the gas began to escape; that there was a strong stench of gas on the first floor at 3 o'clock Monday morning and the explosion occurred about 3:20; that the only way gas could have escaped into the basement was through five feet of gas pipe owned and controlled by defendant, or from 180 feet of house piping not under the control of the defendant; that the outer walls of the first floor were practically all torn out by the explosion, and the outer walls of the second floor and basement not so seriously injured by the explosion. One Poehl, an employee of the defendant, testified that on Saturday at noon before the explosion he turned off the upstairs meter, the tenants on the second floor having moved out, but that he did not touch the downstairs meter. The weather at the time of the explosion was extremely cold, the thermometer being about eight below zero.

A careful examination of the record convinces us that there is no proof showing, or tending to show, that the gas

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escaped from any gas pipe or appliance under the control of the defendant, and that no negligence whatever on the part of the defendant was shown. Counsel for respondent do not claim that there is any direct proof, but insist that the jury had a right to infer from all the facts and circumstances in the case that the gas escaped from appliances under the control of the defendant, and that the doctrine of *res ipsa loquitur* applies. There is no basis in the evidence for such contention. To hold that this verdict can be sustained on the evidence is simply to allow the jury to find on mere conjecture, and it is well settled in this court that a verdict based upon conjecture cannot stand.

It is equally well settled that the doctrine of *res ipsa loquitur* does not apply in the instant case. Counsel rely upon *Carroll v. C., B. & N. R. Co.* 99 Wis. 399, 75 N. W. 176. That case does not support respondent's contention. There the evidence showed that a window in defendant's office, where employees were usually paid, fell, and that it could not have fallen had the catch been properly fastened. It appeared that the window fastening was in perfect condition, and that it could not have dropped had the defendant's servant handled it carefully; therefore the fact that it did drop showed that he did not handle it carefully. The court quotes from *Cummings v. Nat. F. Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665, with approval as follows:

"When the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

A great many cases are cited and discussed by counsel for respondent not only in this state but in other jurisdictions respecting *res ipsa loquitur* doctrine. We cannot see that they have any application here. In the instant case the explosion may have been caused by escape of gas from the

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pipes and appliances not under the control of the defendant, and the cause of the explosion in no way chargeable to the defendant, hence the doctrine of *res ipsa loquitur* has no application. *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36; *Strehlau v. John Schroeder L. Co.* 142 Wis. 215, 125 N. W. 429; *Galst v. American L. Co.* 165 Wis. 307, 162 N. W. 319.

It is argued by counsel for respondent that, because the evidence shows that Poehl turned off the upper meter and after the fire the projecting flange of the inlet cock to the lower meter was found broken, the jury was entitled to find that Poehl did touch the lower meter, although he testified positively that he did not. There is nothing in the case to discredit Poehl's testimony or render it improbable. It is uncontradicted, not against established facts or reasonable probabilities, and in no way discredited. Therefore the jury were bound to accept the evidence of Poehl as true. *Engmann v. Estate of Immel,* 59 Wis. 249, 18 N. W. 182; *Bourda v. Jones,* 110 Wis. 52, 85 N. W. 671; *Daniels v. Foster,* 26 Wis. 686.

We deem further discussion of this case unnecessary. It is clear that there was no sufficient evidence to carry the case to the jury, hence a verdict should have been directed for the defendant.

Other questions are discussed by the appellant as grounds for reversal, but in our view of the case it is unnecessary to consider them.

By the Court.—Judgment is reversed, and the cause remanded with instructions to dismiss the complaint.

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EDWARD T. KELLY COMPANY, Appellant, vs. VON ZAKOBIEL, Respondent.

February 6—March 4, 1919.

Contracts: Oral testimony to contradict writing: Sales: Order for books.

In the absence of proof of duress, fraud, mistake, excusable neglect, or other adequate reason, a written contract (in this case an accepted order for books) which speaks plainly, declares itself to be the entire contract, and is complete in itself, which negatives prior or contemporaneous oral agreements, and which says there are no conditions existing not expressed therein and that it is irrevocable, cannot be contradicted by parol testimony that there was a collateral agreement or condition not stated therein, such as, in this case, that the books were ordered subject to approval.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

Action begun in the civil court of Milwaukee county to recover a balance of $51.50 due on the purchase price of a set of books delivered to defendant in pursuance of the following order:

"*Edward T. Kelly Company,* Chicago.

"Please enter my order for, and deliver to any common carrier, addressed to me, one set of Ridpath's new complete History of the United States, in twelve (12) volumes, three quarters Morocco binding.

"I agree to pay therefor $3 with this order and $3 your order each month until I have paid the full amount of $54.50.

"The books are to remain your property until paid for in full. If two or more consecutive monthly payments become delinquent the whole amount shall then become due. This contract is irrevocable and no conditions affecting it not embodied herein exist. R. VON ZAKOBIEL."

Plaintiff sent the books by Wells-Fargo Express and they were received by the defendant, but in a few days he returned them because they were unsatisfactory and counter-

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claimed for the $3 paid at the time he signed the order. Upon the trial in the civil court he was permitted, against plaintiff's objection, to testify that he bought the books from plaintiff's agent subject to approval and that they were not satisfactory and were returned. The civil court ordered judgment dismissing plaintiff's complaint upon the merits and judgment for defendant upon his counterclaim. Upon appeal to the circuit court the judgment was affirmed and the plaintiff appealed.

For the appellant there was a brief by *Carroll & Carroll* of Milwaukee, and oral argument by *William J. Carroll.*

For the respondent the cause was submitted on the brief of *Herbert R. Manger* of Milwaukee.

VINJE, J. The defendant does not claim that any fraud or duress was practiced upon him or that he signed the order by mistake or did not notice its provisions. On the contrary, his testimony shows that he knew the order contradicted the oral conversations previously had as testified by him and still he signed and delivered it to plaintiff's agent to be sent to plaintiff. It was sent as intended. It was accepted and acted upon by plaintiff as written. It purported to express all the agreements and in plain terms negatived the existence of any conditions not expressed therein. It was declared irrevocable and was to become operative immediately and unconditionally upon acceptance and not upon the happening of some future event, condition, or notice.

Upon the acceptance of the order and the delivery of the books to the defendant the plaintiff became entitled to recover the stipulated purchase price. *Fountain City D. Co. v. Peterson,* 126 Wis. 512, 106 N. W. 17.

The parol testimony admitted materially changed the written contract by making it conditional instead of absolute, and by incorporating conditions expressly negatived in the writing itself. Written contracts cannot be so contradicted by parol testimony. *Borchert v. Skidmore L. Co., ante,* p. 523,

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171 N. W. 70, and authorities cited. The parol testimony was erroneously admitted.

Counsel for defendant calls our attention to the rule of law that permits the entire contract to be shown though a part of it rests in parol. That rule is operative only when there is no vital contradiction between what is expressed in the writing and the oral agreement. But this contract says it is entire. To prove the contrary would be to contradict the writing. We are also reminded that it may be shown by parol testimony that an instrument was given on condition and that such condition has not been satisfied. No doubt such is the rule as to writings that are consistent with such proof. But this instrument says it is irrevocable and that no conditions exist not expressed therein. And finally it is urged that a collateral agreement which was the inducement for entering into the written contract may be shown by parol. No doubt it may in a proper case. But not where the written contract expressly negatives any collateral agreement, and no claim is made that the signature thereto was obtained by reason of duress, fraud, mistake, or excusable neglect.

The law seeks to protect both parties to a written contract. Hence, when a writing speaks plainly and declares itself to be the entire contract, and is complete in itself; when it negatives prior or contemporaneous oral agreements; when it says there are no conditions existing not expressed therein, and that it is irrevocable, it must be held to contain the entire agreement between the parties or else written contracts would become mere scraps of paper subject to the same infirmities of self-interest, forgetfulness, and misunderstanding that attend oral agreements. It is for the purpose of avoiding these infirmities that written contracts are entered into, and it is in the furtherance of justice and honesty that the law declares that what a man has plainly asserted under his own signature he should not be permitted to deny except upon proof of duress, fraud, mis-

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take, excusable neglect, or some other adequate cause. We have no such case here.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing defendant's counterclaim upon the merits and to enter judgment for plaintiff upon its cause of action in the sum of $51.50 and costs as of March 8, 1918.

BADGER STATE INVESTMENT COMPANY, Respondent, vs. MILLER, Appellant.

February 6—March 4, 1919.

Party walls: Agreement construed: Use in construction of adjoining building.

1. In an action involving an agreement under which a party wall had been built by defendant's predecessor in title and, if it was thereafter used in the construction of a building by plaintiff, the latter is liable for one half of the cost, the evidence is *held* to show that such wall does not support plaintiff's building or any part of it; that by reason of its structural character it was incapable of being useful in the construction of plaintiff's building and was in fact a hindrance and obstruction; and hence that there was no such use thereof as the agreement contemplated.
2. The fact that, for the mutual protection of the party wall and the adjoining wall of plaintiff's building, plaintiff inserted metal flashings near the top of the party wall to cause water falling thereon to be shed upon the roof of plaintiff's building, did not constitute a use of the party wall within the meaning of the agreement.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Party wall. Action on contract. An agreement for a party wall was entered into between a predecessor in title of the plaintiff, who was the owner of lot 5, block 70, in the city of Milwaukee upon which the Merrill theater is situated, and a predecessor in title of the defendant, who owned lot 8. The owners of lot 8 erected a party wall, one

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half upon lot 5 and one half upon lot 8, about the year 1899, lot 5 being at that time unoccupied. In the year 1915 the plaintiff procured plans and specifications for the erection of the so-called Merrill theater upon lot 5 and proceeded to erect a theater building in accordance therewith. In the course of constructing its theater building plaintiff countersunk into the party wall nine vertical chases which extend from the bottom to near the top of said party wall and which are twenty feet apart at their centers. The chases were cut to make room for iron columns which were necessary for plaintiff's new building and are twenty-eight inches in width and twelve inches in depth at the basement, and as they ascend they diminish in depth as the party wall diminishes in thickness. In the course of its operations the plaintiff removed from the party wall at the foot and at the base of all said chases portions of the material of the party wall, cut off the top portions of the piles, and into the recesses so made plaintiff inserted nine vertical steel columns for the purpose of supporting, by means of horizontal beams resting upon them, the weight of plaintiff's building. The said steel columns are from three to four inches north of the south line of lot 5 and are wholly independent of the party wall and of its foundations and the piling thereof. The steel columns at the first-floor line rest upon and are supported solely by concrete columns, which in turn rest upon and are supported solely by nine cantilever foundations extending into lot 8 at right angles to the party wall, said foundations being constructed of reinforced concrete six feet three inches thick and twelve feet wide, which rest upon and are supported solely by piling driven entirely within the limits of lot 5, and at no point closer than three feet to the south line thereof. The cantilever foundations are in all respects adequate and sufficient to safely support the weight of the ten-story building which the plaintiff has agreed to erect on said lot 5. A little above the top of the south wall of plaintiff's building, lot 5 being north of lot 8, and near

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the top of the party wall, the plaintiff, for the mutual benefit and protection of the party wall and plaintiff's south wall, inserted metal flashings in the party wall to cause water falling thereon to be shed onto the roof of plaintiff's building and thereby prevent it from entering between the party wall and the south wall of plaintiff's building. Plaintiff's building, including its foundation and the south wall thereof, is entirely independent of the party wall. Such are the findings of the trial court. It further appears that the party wall is not so constructed as to carry heavy strains at widely separated points and is not adapted for use in the style of building constructed by the plaintiff.

A dispute arose between the parties as to the liability of the plaintiff under the party-wall agreement. An appraisement was had, the cost of constructing the same on the basis set forth in the party-wall agreement was ascertained, the amount thereof deposited in the hands of a third person, and this suit is brought to determine the right of the plaintiff to the deposit made by it. Plaintiff had judgment in the court below, from which the defendant appeals. Other facts are stated in the opinion.

For the appellant there was a brief by *Lenicheck, Boesel & Wickhem* of Milwaukee, and oral argument by *F. J. Lenicheck* and *F. T. Boesel.*

For the respondent there was a brief by *Austin, Fehr & Gehrz* of Milwaukee, and oral argument by *Gustave G. Gehrz.*

ROSENBERRY, J. The party-wall agreement recites the ownership of the respective premises, describes in general terms the character of the party wall to be constructed, and contains the following covenants:

"Said first party further covenants to construct said party wall of good merchantable material and of sufficient firmness and stability to properly support the walls and timbers of the building of said second party when she [plaintiff's predecessor in title] shall erect the same.

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"Said party of the first part [defendant's predecessor in title] also covenants and contracts that when second party shall build upon that portion of her said lot which is contiguous to said first party's lot and shall need said party wall, said party wall may be used by her for so much of the depth and height thereof as she may require for the building which she shall construct at any future time.

"Said second party hereby covenants and contracts that in case of the use of said party wall by her as herein provided shall pay for the same to the said first party, which shall be such sum as at the time when she shall build will be required to construct one half of said wall for the distance in depth and height which was used by her in such construction."

There were other clauses in the contract providing for appraisement and making it an obligation upon the part of the successors in title of the respective parties thereto. The sole question to be determined is, Did the plaintiff make such use of the party wall as made it liable for the cost of one half thereof under the terms of the party-wall agreement?

It is admitted that the party wall was erected in accordance with the contract and that if the plaintiff has used it within the meaning of the contract it cannot recover the deposit in question. It further appears that the plaintiff in constructing the Merrill theater was permitted to use six-inch fire brick for the south wall, which is a wall of less thickness than it would be permitted to use under the fire ordinances of the city of Milwaukee if the party wall were not there. But it also appears that it used fire brick of the same thickness on the north side of the building, there being an adjacent building, although it had no interest in the wall on the adjoining premises. No joists or timbers were inserted in the party wall by the plaintiff.

We have been referred to and have examined a large number of cases relating to the use of party walls. While these are helpful they are not controlling, because each case depends upon its own peculiar facts or upon the language of

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the contract or statute which governs. The contract here provides that when plaintiff builds upon that portion of lot 8 which is contiguous to defendant's lot, "and shall need said party wall, said party wall may be used by her [plaintiff] for so much of the depth and height thereof as she [plaintiff] may require for the building which she [plaintiff] shall construct at any future time," and she (plaintiff) is to pay for that part of the wall used by her in the construction of her building. The use which is to make the second party (plaintiff) liable for one half the cost of the wall is thus defined by the contract itself.

It is clear that the party wall, instead of being useful to the plaintiff in the construction of its building, was a hindrance and obstruction. By reason of its structural character the party wall was incapable of being useful to the plaintiff in the construction of its building. It did not use it. The party wall does not support plaintiff's building or any part of it, walls or foundation. It does not appear that the plan adopted by the plaintiff for the construction of its building was a mere device to escape liability under the party-wall agreement. On the contrary, it appears that in order to construct its building it was required at an extra expense to remove parts of the party wall before it could proceed with its building. While there may be contact points between the buildings of the plaintiff and the defendant, and while the flashing described in the findings of the court rests partly upon the building of the plaintiff and the party wall, this was not such a use of the party wall as was contemplated by the parties to the contract, and therefore the plaintiff is not liable by reason of such use. The plaintiff has not used the party wall for the building which it has constructed, within the meaning of the contract. The judgment of the circuit court is therefore right.

By the Court.—Judgment affirmed.

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FRED MILLER BREWING COMPANY vs. KNEBEL and wife, imp., Respondents: HOPPE, Receiver, Appellant.

February 6—March 4, 1919.

Appeal: Orders: Extension of time limited.

The time limited by sec. 3042, Stats., for the taking of an appeal from an order of the circuit court cannot be extended by an application, made after such time has expired, for a modification of the order so that it shall grant the relief which it denied and an attempted appeal, under sec. 3049, from both the original order and a second order specifically denying such modification. The second order, in such case, is not appealable.

APPEAL from two orders of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Dismissed.*

The appellant herein was receiver in this mortgage foreclosure action. Pursuant to the judgment the premises were sold on December 24, 1917. On January 4, 1918, the receiver paid out of funds then in his hands the city and county taxes for 1914. Upon the hearing on his account the circuit court, upon objections being interposed thereto, determined that certain items claimed by him, including those for such taxes, should be disallowed and he be required to account therefor, and a written order to that effect was made on March 6, 1915. Notice of entry of such order was duly and immediately served.

On April 30th, upon receiver's application, by an order to show cause of April 24th, to partially modify the aforesaid order of March 6th, the court made an order changing a portion of the order of March 6th so that it now recites that the sale of December 24th was made subject to *certain* of the taxes then outstanding instead of *all* the outstanding taxes, and then specifically denied the motion to modify so far as it concerned the disallowance of the credit claimed by him for the payment of the taxes. Exceptions were filed by the receiver to these orders of March 6th and April 30th. Due

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notice of the entry of the latter order was served on the respective parties. On May 6th the receiver gave notice of appeal to this court from so much of the order of March 6th as denied him credit for the payment of the taxes aforesaid and from the order of April 30th. The defendants *Henry P.* and *Emma Knebel,* who were the mortgagors of said real estate and the respondents herein, have moved to dismiss such appeal.

For the appellant there were briefs by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles,* of counsel, all of Milwaukee, and oral argument by *J. V. Quarles.*

For the respondent *Henry P. Knebel* there was a brief by *Curtis, Dorr & Mock* of Milwaukee, his attorneys, and *Frank T. Boesel,* attorney for respondent *Emma Knebel;* a separate brief for the respondent *Emma Knebel* by *Lenicheck, Boesel & Wickhem,* attorneys, and *Frank T. Boesel,* of counsel, all of Milwaukee; and the cause was argued orally by *Frank T. Boesel.*

ESCHWEILER, J. For more than thirty days after service upon him of notice of the entry of the order of March 6, 1918, no attempt was made by the receiver to give any notice of intention to appeal therefrom. By the order to show cause of April 24th he sought to have reviewed and modified the identical matter disposed of by the court by its order of March 6th, and the substance and effect of such latter order was no more than a repetition of that which had been done on March 6th. The first order, therefore, being in force and unreversed, concluded and determined the subject matter of the second order. *Hoefer v. Milwaukee,* 155 Wis. 83, 143 N. W. 1038; *Erin Prairie v. Wells,* 158 Wis. 140, 147 N. W. 374, 148 N. W. 1095.

Since neither the consent of parties nor action of the court can extend the statutory time for the taking of an appeal *(Filer & Stowell Co. v. C., M. & St. P. R. Co.* 161 Wis. 591, 155 N. W. 118), such a result cannot be reached by the indirect method of again moving for the same relief that was

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refused in the prior order. The order of April 30th not being an appealable one and the time for appealing from the order of March 6th having expired, there is no appealable order before us. It is therefore unnecessary to consider the effect of the language relied upon by receiver's counsel, found in sec. 3049, Stats., which provides, "An appeal may embrace two or more appealable orders if the time for appealing therefrom or *from either of them* has not expired," and any possible conflict there may be between that statute and the effect to be given to sec. 3042, Stats., which limits the time within which appeals may be taken from orders made by the circuit court to thirty days after written notice of the making of the same.

We are prompted to also say that an examination of the record before us satisfies us that a dismissal of this appeal works no injustice to the receiver.

By the Court.—Appeal dismissed.

GILL, Guardian, Respondent, vs. HERMANN and wife, Appellants.

February 7—March 4, 1919.

Appealable orders: Guardian's action for money of ward: Courts.

1. Neither an order refusing to dismiss an action nor an order of reference is appealable.
2. *It seems* that an action by a general guardian to recover money belonging to his ward may be brought in the circuit court.

APPEAL from orders of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Dismissed.*

Martin J. Brennan of Milwaukee, for the appellants.

For the respondent there was a brief by *Gugel & Kline* of Milwaukee, and oral argument by *F. H. Gugel.*

WINSLOW, C. J. The action is brought by the general guardian of an incompetent person to recover money belonging to her ward, and this appeal is from an order refus-

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ing to dismiss the action and referring the same to take an account, as well as from a subsequent order denying a motion to vacate the first named order.

The defendants' contention is that the circuit court has no jurisdiction because the claim is one within the jurisdiction of the county court. We know of no good foundation for this argument. It is the statutory duty of a general guardian to "sue for" and collect all debts due to his ward (sec. 3982, Stats.), and the circuit court is the proper forum for actions for money had and received.

However, it is entirely certain that neither an order refusing to dismiss an action nor an order of reference is appealable (*Raymond v. Keseberg,* 98 Wis. 317, 73 N. W. 1010; *Wilt v. Neenah C. S. Co.* 130 Wis. 398, 110 N. W. 177), and for that reason we refrain from discussion of the merits.

By the Court.—Appeal dismissed.

BRITTAN, Trustee, Appellant, vs. BUERGER COMMISSION COMPANY, Respondent.

February 7—March 4, 1919.

Money lent: To whom? Note of third person as payment: Presumption: Evidence: Special verdict: One question covering two matters: Instructions to jury: Bankruptcy: Prior payments: Fraudulent transfer: Unlawful preference.

1. A finding by the jury to the effect (1) that the money represented by a check sent by the defendant to, and payable to the order of, the president and manager of a grain company, was in fact loaned to that company, although the only written obligation given on account thereof was the individual note of the vice-president of the company, and (2) that the presumption that said note was received by defendant as payment of the money advanced was rebutted and overcome,—is *held* to be sustained by the evidence.
2. Although, perhaps, it would have been better had the two questions above indicated been submitted to the jury separately, yet under the instructions given the one question which was submitted, *i. e.* as to whether the money was a loan to the grain company, sufficiently covered both propositions.

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3. Although, pursuant to an arrangement with said grain company and with the consent of its successor (which had assumed the liability), defendant applied certain credits in part payment of the loan, and within four months thereafter such successor was adjudged a bankrupt, and even if the evidence tended to show insolvency of such successor at the time such application of credits was made, yet there was no evidence warranting submission to the jury of the question whether that application constituted either a fraudulent transfer or an unlawful preference under the bankruptcy act—the transaction having been, so far as the evidence shows, an ordinary business transaction between two going concerns, both acting in good faith and both believing themselves to be solvent.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

Action by the trustee of the P. B. Mann-Anchor Company, a bankrupt Minnesota corporation, against the defendant, a Wisconsin corporation, to recover $3,646.63 on account of the proceeds of grain consigned by the bankrupt to the defendant for sale on commission. The value and amount of the grain consigned to and sold by the defendant was admitted, but the defendant claimed that in June, 1914, it advanced $5,000 to the Anchor Grain Company (the predecessor of the P. B. Mann-Anchor Company) upon the agreement that the same was to be repaid out of the proceeds of the sale of grain so consigned to and sold by the defendant; that in August, 1914, the Anchor Grain Company and the P. B. Mann Company (also a Minnesota grain-dealing corporation) were consolidated and the P. B. Mann-Anchor Company formed, which took over the assets and assumed the liabilities and obligations of both corporations, including the contract aforesaid; that the consignments of grain for the value of which this action was brought were made under that arrangement; and that the defendant, pursuant to said arrangement with the Anchor Grain Company and the P. B. Mann-Anchor Company, had applied the said sum of $3,646.63, out of the proceeds of the grain so consigned to it, to the payment of said $5,000 advance, leaving

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$1,510.31 still due thereon. The plaintiff claimed in reply that said $5,000 advance was not made to the Anchor Grain Company, but to one A. F. Brenner, the vice-president of the company, on his own individual credit, and further that, in any event, the application by the defendant in payment of the $5,000 advance of the sums owing for grain consigned and sold was void under the provisions of the bankrupt act as a fraudulent transfer or unlawful preference, or both.

The action was tried before a jury, which returned a special verdict composed of one question and answer as follows: "Was the $5,000 represented by defendant's check of June 27, 1914, a loan to the Anchor Grain Company? *A.* Yes." Upon this verdict judgment was rendered dismissing the complaint upon the merits and determining that the P. B. Mann-Anchor Company was indebted to the defendant in the sum of $1,510.31, and from this judgment the plaintiff appeals.

For the appellant there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Emmet Horan, Jr.,* of counsel, all of Milwaukee, and oral argument by *Mr. Horan.*

For the respondent there was a brief by *Roehr & Steinmetz,* attorneys, and *Julius E. Roehr,* of counsel, all of Milwaukee, and oral argument by *Julius E. Roehr.*

WINSLOW, C. J. It is undisputed that the defendant sent its check for $5,000 payable to the order of Mrs. Sarah M. Passmore, the president of the Anchor Grain Company, on June 27, 1914. It is also undisputed that the check was sent to Mrs. Passmore as the immediate result of a conversation had by Mr. A. F. Brenner, vice-president of the company, with Mr. Riebs, treasurer of the defendant, at Milwaukee on the same day, and that no note or acknowledgment of indebtedness was ever received by the defendant from the Grain Company, but that Mr. Brenner gave his individual note therefor. It further appears that the money

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was credited to Brenner's account, which was then overdrawn on the books of the Grain Company, and charged against Brenner on the books of the defendant company. Mr. Brenner also testified that he borrowed the money on his individual account.

The first claim of the plaintiff is that on this evidence and some other evidence of minor importance a verdict for the plaintiff should have been directed, because it is proven without substantial dispute that the loan was a loan to Brenner and not to the Grain Company.

In this connection the plaintiff makes the additional claim that, even if there were evidence in the case which would sustain a finding that the loan was made to the Grain Company, still there was no evidence to meet the well-understood presumption that when the note of a third person is received for an indebtedness contracted at the time, it is received as payment of, or, as it is sometimes said, in exchange for, the goods sold or money advanced. *Challoner v. Boyington,* 83 Wis. 399, 53 N. W. 694.

We are unable to agree with either contention. It clearly appears from all of the evidence in the case that Sarah M. Passmore was not merely the president but the active managing officer of the Anchor Grain Company as well as of the Mann-Anchor Company, who, with the consent of the directors, exercised full authority in all business transactions of either company. Mr. Riebs, the defendant's treasurer, testified directly that in the month of June, before the advance was made, Mrs. Passmore came to Milwaukee, talked over the grain business for the coming year, and wanted to know if the Anchor Grain Company could obtain a loan of $5,000 or $10,000 from the defendant in case they needed it to handle the expected large crop; that he told her they would be pleased to accommodate her with $5,000, and if necessary would extend credit for a larger amount; that she was pleased and promised to let the defendant handle all their grain coming to Milwaukee, and said that Mr.

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Brenner would come and visit Mr. Riebs to learn the prospects for the future, and that the advance if made would be taken care of by allowing the credits on the cars consigned to stand until they should cover the amount of the loan. Mr. Riebs further testified that after that interview Mr. Brenner came to Milwaukee, talked about the grain situation, the large amount of money that it would take to swing it, and wanted to know the credit which the Anchor Grain Company could get from the defendant, and was told by the witness that they could have $5,000 or $10,000; that he (Brenner) said they could use the money right now, and as the outcome of the interview the check of $5,000 was sent to Mrs. Passmore; that Mr. Brenner also said that he wanted the money for the Anchor Grain Company.

In addition to this testimony of Mr. Riebs there are in the record letters from the Mann-Anchor Company through its president and managing officer, Mrs. Passmore, written in October, November, and December, 1914, in substance acknowledging the note as the note of the Mann-Anchor Company and arranging to pay it by letting the balances due them from the defendant company on cars consigned, over and above the drafts drawn thereon, stand and accumulate until they amounted to enough to pay the note.

There is much other evidence in the record tending in an indirect way to substantiate the defendant's claim that both parties understood that the $5,000 advance was in fact an advance to the Anchor Grain Company and not to Brenner personally, notwithstanding the fact that Brenner's individual note was the only written obligation given for it. The business relations of the two corporations were very close and friendly, the defendant corporation evidently had the most implicit confidence in the financial soundness and integrity of the Anchor Company and its successor, the Mann-Anchor Company, and a careful reading of the evidence impresses us with the idea that they advanced the money in question on the credit of the Anchor Company and

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expecting that company to pay it. Mr. Brenner himself testified that he looked to the Anchor Company to take care of the loan.

Without attempting to review the entire evidence in the case in this opinion, we may say that we are convinced that there was sufficient evidence to permit the jury to find not only (1) that the loan was in fact made to the Anchor Grain Company, but (2) that the presumption that Brenner's note was received in payment or exchange for the loan was overcome.

Perhaps it would have been better had these two questions been submitted to the jury separately, but under the instructions given to the jury the one question submitted covered both propositions. They were instructed that if they were satisfied to a reasonable certainty by the preponderance of the evidence that the $5,000 was loaned to the Anchor Grain Company on its request and on its faith and credit and that the defendant looked to said company and not to Brenner for payment, and that the Grain Company and not Brenner became liable to the defendant for the payment of the loan, they should answer the question submitted to them in the affirmative, and if not so satisfied they must answer it in the negative. Previous instructions had informed them in effect that the fact that Brenner's individual note was received by the defendant tended to show that the defendant looked to him for payment, but was not conclusive and was open to explanation. Taking all the instructions together, they seem to us to have informed the jury in substance that the fact of the taking of Brenner's note created a presumption that it was received in payment, which presumption, however, was open to explanation or rebuttal by other facts tending to show that both parties expected and intended that the loan was in fact made to the Grain Company and was to be repaid by that company.

The application of credits was made by the defendant January 5, 1915, and the petition in bankruptcy was filed

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within four months thereafter, to wit, March 25, 1915, and the plaintiff contends that the jury should have been asked whether the application constituted either a fraudulent transfer or an unlawful preference within the provisions of secs. 67 (e) and 60 (a) (b) of the federal bankruptcy act. Proper requests were made that these questions be submitted to the jury, which were refused and exception taken.

We have been unable to reach the conclusion that there was any evidence in the case which would have justified the submission of either question to the jury. If it be granted that there is any substantial evidence tending to show insolvency of the Mann-Anchor Company in January, 1915, there is absolutely no evidence that the defendant had any knowledge of the fact or had any reason to believe that the application of credits would effect a preference; nor is there any evidence tending to show that the Mann-Anchor Company consented to the application with intent to hinder, delay, or defraud creditors.

So far as the evidence shows, the transaction was an ordinary business transaction between two going concerns, both acting in good faith and both believing themselves to be solvent.

In our judgment a just result has been reached in this case without prejudicial error.

By the Court.—Judgment affirmed.

TOY, Respondent, vs. MANDERIN COMPANY, imp., Appellant.

February 7—March 4, 1919.

Landlord and tenant: Long term: Improvements by lessee: Default: Unlawful detainer: When equitable action by lessor is necessary: Statute construed.

1. A lease of parts of a building for a term of sixty years, which gave the lessee "permission" to remodel the premises to fit them for the uses for which they were let, but did not *require* him to make any such changes or in any way indicate the cost

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thereof, is not such a lease as is contemplated by sec. 2197*a*, Stats., requiring the lessor to pursue an equitable remedy in the nature of a foreclosure action to terminate such a lease as is there described after required improvements costing more than $5,000 have been made by the lessee.

2. It being manifest from the terms of the lease that the matter of making the changes and the cost thereof were left to the lessee's discretion, it cannot be held that the fact, if it was a fact, that the lessor knew the contemplated remodeling would necessarily cost more than $5,000 brought the lease within the class described in said statute.
3. A provision in such lease that upon its expiration or in case of a breach of condition by the lessee he would upon request of the lessor place the premises in the condition in which they were at the time of signing the lease, clearly indicates that the parties did not regard the remodeling as an improvement of the premises within the meaning of said sec. 2197*a*, Stats.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

The appeal is from a judgment affirming a judgment of the civil court of Milwaukee county in an action of unlawful detainer, in favor of the plaintiff and against the defendant.

Charles Toy, the plaintiff, owns a six-story building located on the east side of Second street, between Grand avenue and Wells street, Milwaukee. On October 2, 1916, he leased the north half of the first floor with certain reservations and the entire sixth floor of the building to the defendant *Frank Rigas,* the leased portion to be used as a café, restaurant, saloon, and palm garden. Permission to remodel the premises to fit them for these purposes was given by the lease, which was made for sixty years and provided for a graduated schedule of rentals. The annual rental was to be paid in equal monthly instalments in advance on the first day of each month. With the consent of the plaintiff said defendant subleased a portion of the premises to the defendant *Rigas Hotel Company* and to others.

On April 18, 1918, *Charles Toy* served notice on all of the defendants to pay rent or quit, claiming that there was unpaid $1,855.21 of their rentals. At the end of the usual

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three days, in default of payment, he instituted this action to oust the defendants.

As a defense the defendants allege that the premises, when leased, contained no facilities for the purposes of conducting a café, saloon, restaurant, and palm garden; that they erected and constructed improvements on the premises exceeding in value $20,000; that these improvements were completed prior to the commencement of this action; that the lease provides for a term of more than fifty years; and that for these reasons the court has no jurisdiction of the subject matter of this action.

The civil court entered judgment that the plaintiff have restitution of the premises and recover the sum of $18.90 costs. The circuit court affirmed the judgment of the civil court, with $10 costs, to be paid the plaintiff by the defendants. Appeal is taken from this judgment.

For the appellant there was a brief by *Gugel & Kline* of Milwaukee, and oral argument by *F. H. Gugel.*

For the respondent there was a brief by *Stover & Stover* of Milwaukee, and oral argument by *James H. Stover.*

SIEBECKER, J. It is provided by sec. 2197*a*, Stats.:

"Whenever there shall be any default in the conditions of any lease of lands or a breach of the covenants thereof and such lease shall provide for a term exceeding fifty years and require the lessee to erect or construct improvements or buildings upon the land demised at his own costs and exceeding in value the sum of five thousand dollars, and such improvements shall have been made, and the lessor desires to determine the lease" and recover possession of the property free from lessee's liens and claims upon conditions broken or breach of covenant, he may enforce his right in equity "and proceed in all respects as if the action was brought under the statute to foreclose a mortgage upon real estate, except that no sale of the premises shall be ordered."

The question presented is: Did the court err in holding that the lease involved here is not one of the class included within the terms of the foregoing statute? One of the con-

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ditions of a lease, to bring it within this statute, is that it shall "require the lessee to erect or construct improvements or buildings upon the land demised at his own cost" in excess of $5,000 in value. The terms of the lease in question on this subject provide: "Permission is hereby given the lessee to remodel any and all of said demised premises to conform to the purposes for which the same are demised." This is the only stipulation in the lease pertaining to the right granted the lessee to make changes in the building to adapt it to the uses specified in the lease. There is no provision in the lease requiring the lessee to make these changes, nor do the conditions respecting remodeling of the building by lessee in any way indicate the cost thereof. Manifestly under the terms of the lease the nature, kind, extent, and cost of remodeling the interior of the premises demised for the installation and conduct of lessee's business were wholly within his discretion. Under the covenants lessor could not require of lessee to construct improvements on the premises, nor do the terms of the lease prescribe that an amount in excess of $5,000 was to be expended in the contemplated remodeling. It is manifest that the intent of the parties, as shown by the terms of the lease, was to leave this matter to the discretion of the lessee. The contention that lessor understood and knew that the contemplated remodeling of the interior of the building would necessarily cost in excess of $5,000 and therefore the language employed in the lease should be construed as embodying an agreement that it would cost that amount and thus come within the calls of the statute, is not sustained. This would be doing violence to the express terms of the lease and be contrary to the manifest intent of the parties. The provisions of the lease that lessee agrees, upon request of the lessor, at the expiration of the term "to remove the partitions, doors, walls, plumbing, and movable equipment promptly, and to place the said premises in the shape in which the premises were at the signing of this lease," and to do likewise in case of a

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termination of the lease for breach of conditions, indicate very clearly that the parties understood that the remodeling was not regarded by them as an improvement of the premises within the meaning of the provisions of sec. 2197*a*, Stats. The trial court properly held that the judgment of the civil court must be affirmed, upon the ground that the lease is not controlled by the provisions of this section, and that plaintiff is entitled to judgment for removal of defendants from the premises for breach of the conditions of the lease and to have restitution thereof.

By the Court.—The judgment appealed from is affirmed.

STATE, Appellant, vs. ERICKSON, Respondent.

February 8—March 4, 1919.

Taxation: Reassessment: Refusal of town clerk to deliver roll to reassessors: Penalty.

Under sec. 1087—46, Stats., providing that the persons appointed by the tax commission to make a reassessment in a district shall, while engaged therein, "be entitled to have custody and possession of the roll containing the original assessment," it is the duty of the town clerk having possession of such roll, and he is required, to deliver it, upon demand, to the persons so appointed, and his wilful neglect or refusal to do so subjects him to the penalty prescribed in sec. 1087—56.

APPEAL from an order of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Reversed.*

This action was brought to recover the forfeiture provided by sec. 1087—56, Stats. The complaint is as follows:

"The plaintiff above named complains of the defendant and for cause of action alleges:

"1. That the defendant, *Carl Erickson,* is indebted to the plaintiff in the sum of two hundred and fifty dollars ($250), under sec. 1087—56 of chapter 48*c* of the Wisconsin Statutes (sec. 33 of chapter 769, Laws of 1913), because of the defendant's wilful refusal on the 12th day of September, 1918, to deliver to Fred Chaffey and C. P. Hanson, and to permit them or either of them to have the custody or pos-

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session of the roll containing the original assessment of the taxable property in the town of South Range for the year 1917.

"2. That said Fred Chaffey and C. P. Hanson on said date demanded of *Carl Erickson,* the defendant, the custody and possession of the roll containing the original assessment in the town of South Range for the year 1917, and that the defendant wilfully refused to permit them or either of them to have either the custody or possession of said roll; that at the time of said demand the defendant was the town clerk of said town of South Range, and in the custody, control, and possession of said roll, and that said Fred Chaffey and C. P. Hanson had theretofore been appointed by the tax commission of Wisconsin to make a reassessment of the taxable property in the town of South Range for the year 1917, and at the time of said demand and refusal were engaged in said town in making said reassessment, and were entitled to have the custody and possession of the roll containing the original assessment of the town for the year 1917.

"Wherefore the plaintiff demands judgment against the defendant for the sum of two hundred and fifty dollars ($250), together with its costs and disbursements."

The defendant and respondent demurred to the complaint for the reason that it appears upon the face thereof that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the case is here on appeal from the order sustaining the demurrer.

For the appellant there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

For the respondent the cause was submitted on the brief of *Luse, Powell & Luse* of Superior.

KERWIN, J. The main contention on the part of the respondent to sustain the demurrer is that the statute does not require the town clerk to deliver the tax roll to the persons appointed to make the reassessment, and that in the absence of such positive requirement by the statute no forfeiture was committed in refusing to make the delivery. In

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other words, it is argued that the duty of the town clerk to deliver the tax roll to the persons appointed to make the reassessment arises only by implication, because no duty is expressly imposed by the statute to do so. We think the construction contended for by respondent too technical. The statute provides that persons appointed to make the reassessment shall have access to all public records and files which may be needful or serviceable in the performance of said duties, and while engaged therein shall be entitled to have custody and possession of the roll containing the original assessment in said district and all property and other statements and memoranda relating thereto.

Sec. 1087—56, Stats., provides: ". . . If any person required to perform any duty under sections 1087—46 to 1087—56, inclusive, shall wilfully neglect or refuse to do so, he shall forfeit to the state not less than fifty nor more than two hundred and fifty dollars."

Now since the town clerk has possession of the tax roll, and the persons appointed to make the reassessment under the provisions of the statute are entitled to the tax roll for that purpose, it seems quite clear that the legislative intent was that on demand the town clerk should deliver to such persons appointed to make the reassessment the tax roll and other papers mentioned in sec. 1087—46, Stats. So we are inclined to hold that the complaint states a good cause of action, and that the demurrer should have been overruled. The order appealed from must therefore be reversed.

By the Court.—The order appealed from is reversed, and the cause remanded with direction to overrule the demurrer, and for further proceedings according to law.

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PRICE, Plaintiff in error, vs. THE STATE, Defendant in error.

February 8—March 4, 1919.

Constitutional law: Regulating practice of optometry: Police power: Ex post facto law: Due process of law: Classification: Persons exempted: Discrimination in favor of nonresidents: Evidence of violation of law: Who may hold themselves out as qualified: Statute construed.

1. The practice of optometry has a real and direct bearing upon the public health and calls for special skill and knowledge; and sec. 1435*f*—35, Stats. 1917, regulating such practice and limiting it to persons duly licensed as therein prescribed, is a valid exercise of the police power.
2. The fact that said statute prevents many who were engaged in the practice of optometry at the time of its enactment from continuing therein does not render it void as an *ex post facto* law; nor is the statute invalid on the ground that it deprives any person of property without due process of law.
3. Said statute is not invalid because it permits persons to select their own glasses although harm may result from such selection. An attempt of the legislature to suppress or minimize an evil is not to be condemned because it does not entirely eradicate it.
4. As to matters of classification the legislature has a very broad discretion and its judgment with reference thereto will be respected and enforced by the courts unless the classification is so arbitrary that there is no conceivable basis in reason therefor.
5. Said statute is not rendered invalid by the fact that physicians and surgeons, and persons who sell spectacles without attempting to test the eyes, are exempted from its provisions.
6. The provision in said law that the board of examiners may permit to practice optometry in this state any person who has been admitted to such practice in another state, upon production of a certificate showing that he has passed an examination in such other state and has actually practiced optometry therein for a term of two years, does not improperly discriminate against residents of this state or render the law invalid.
7. The evidence in this case, showing, among other things, that defendant tested the eyes of a patient by means of a "big frame," different lenses, and a card with different sized letters thereon, until he found that her eyes were good, and then he gave her a pair of even glasses,—is *held* sufficient to show

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that he violated sec. 1435*f*—35, Stats. 1917, by employing "means, other than the use of drugs, for the measurement of the powers of vision and the adaption of lenses for the aid thereof."

8. After providing that every person who, not having obtained the required certificate, "shall hold himself out to the public as qualified to engage in the practice of optometry" shall be guilty of a misdemeanor, etc., the act further provides that nothing therein shall be construed to apply "to persons who shall sell spectacles from an established place of business without attempting to test the eyes." *Held,* that the act is not to be construed as permitting one who sells spectacles without attempting to test the eyes to hold himself out to the public as qualified to engage in the practice of optometry.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

Plaintiff in error was found guilty in the municipal court of Milwaukee county of practicing optometry as defined in sec. 1435*f*—35, Stats., without first having obtained a license authorizing him so to do. He brings writ of error to review the judgment of conviction.

The uncontradicted evidence shows that on the 17th day of January, 1917, one Mrs. Helen Bauer, who had broken her glasses, called at his office to have them fixed. He was not there, and she left word to have him call at her house, which he subsequently did. He put a big frame on her face and tested her eyes. He gave one of her girls a card and she had to stand away. There were different sized letters on the card. He asked her to read the letters on the card, until finally he found that her eyes were good, and then he gave her a pair of even glasses. She paid him $2 therefor. He has a big sign on his house with his name and a picture of an eye on it.

Charles D. Waugh testified that he was secretary of the Wisconsin board of examiners of optometry; that the defendant *Price* had not been licensed to practice optometry in the state of Wisconsin, although soon after the law went into effect he appeared and took the examination on three

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different occasions, failing each time. He testified that the optometrical examination consists of an examination on four different subjects, namely, anatomy and physiology of the eye and its appendages; physical and theoretical optics; practical optometry, and, in addition to that, the applicant is required to show by a practical demonstration that he understands the use of the various instruments concerning which an optometrist should be familiar. The applicant for a license to practice optometry is expected to demonstrate a knowledge of the general make-up and construction of the eye and to be able to recognize a healthy eye—that is, an eye which may properly be fitted with glasses as against an eye which should be directed to a doctor for medical attention. In other words, to differentiate between those cases which require a physician's attention and those which may be fitted with glasses without being referred to a physician. The subject of anatomy and physiology of the eye includes a knowledge of the muscles and the lids, the blood-vessels, and nerves. The applicant is expected to know the source of the blood supply, the nerve supply and its general action; the action of the nerves on the muscles, and which nerves control the action of the different ocular muscles. Physical optics is that branch of the general subject of physics which deals with light primarily, the action or effect of lenses on light, and how light is directed, reflected, and refracted. The applicant must understand the spectrum. He should know which colors of the spectrum are easy on the eyes and which rays of light are hard on the eyes. Physiological optics means the effect of lenses on the eyes, the effect of light, the different effect that lenses may have on the eye itself. In other words, physiological optics is that part of optics referring to the effect of lenses on light which enters the eyes. A man practicing optometry should know exactly what effect the different forms of lenses will have on the rays of light as they come from different directions, from different positions, from different distances, on the eyes.

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Assuming that rays of light coming from twenty feet or more are parallel, the effect of these rays will be different than rays of light coming from a source within twenty feet. The rays of light will be divergent as they enter the eyes from a nearer source, and the effect on different lenses is different. A person should know all about that in order to fit a pair of glasses. If an optician is not familiar with the subject he is very apt to cause great distress to his patient by putting on a lens simply because it is not properly centered; by bending the rays of light the eye would have to turn itself to meet the rays of light as they enter the eye and the patient could thereby be caused great discomfort and perhaps permanent injury, and the patient will not be aware of it for days afterwards and perhaps for a longer period than that. An optician should not only have this fundamental knowledge, but should know how to apply it; that is, he should be able to take such knowledge and fit and grind a pair of glasses. There are four or five practical instruments with which an optometrist should be familiar. Such instruments are the ophthalmoscope, the retinoscope, the ophthalometer, the phorometer, and the trial case. The trial case consists of various lenses, and the practitioner should know how to fit a pair of glasses without asking the patient too many questions, because the patient cannot know how to intelligently answer him as to what he may see. A patient who has a slight astigmatism and also is far-sighted, if left to pick out his own glasses will almost invariably select near-sighted glasses. A near-sighted glass, before a patient of that kind, will give him seemingly better vision, but it will result in a constant eye-strain, because it will make his condition of far-sightedness and stigmatism worse. We frequently have to send away persons who do not see so well with their glasses as they do without them, knowing that the glasses are for their good and will give relief for certain conditions of which they are complaining. The final judgment as to whether the patient can see well is with the

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patient, but the final judgment as to whether or not glasses are good for the patient is not with the patient. The patient is often sent out with glasses when he says he cannot see as well with the glasses as he can without them. After it has been determined with the use of the various instruments what a patient ought to wear, for instance one of these far-sighted astigmatic cases, the proper lens is put on that man's eyes, and almost invariably he will at first not see as well with that lens as he would without the lens and not nearly so good as he could see with a near-sighted lens. If the patient were permitted to decide he would say, give me the glasses I can see through, but it would be the worst thing for that man that could possibly be done for him.

Dr. Claude S. Beebe also testified that he is a physician specializing in eye, ear, nose, and throat, who has graduated from the Wisconsin College of Physicians & Surgeons and who took post-graduate work at the New York Ophthalmic and London Eye and Ear Hospital. He testified that the patient is absolutely unable to determine himself whether or not his glasses are proper or improper. A person who is fitted with glasses never knows what his vision should be. He may have a poor sight all his life and not be in a position to know what perfect sight is until he gets correct glasses. That condition is one that is very commonly found and is a condition that is frequently prevalent among people who use their eyes a great deal. A far-sighted person or an individual who sees perfectly for a distance may still have eye-strain and not know it. In examination of school children it is found that many children who have perfect vision suffer from nervous disorders and should be wearing glasses to correct that defect. In near-sighted people who are unable to see distinctly for a distance they have an error that should be corrected, and unless they have been through a test and have been told what perfect vision is they have no idea what they should see, and when they get their glasses which are correctly fitted they for the first time realize what

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other people are seeing. In other words, they themselves cannot judge what perfect sight is, or whether a glass is correctly fitted or not. Sight is not the determining feature always in glasses; the eye-strain, which is simply one expression of a nervous lack in the system, is corrected by a glass, and then they realize for the first time that they have had an error which they themselves had been unconscious of. Bright's disease or kidney condition is a condition where there is a disease of the blood-vessels. This is indicated many times very early in the disease by hemorrhages in the inside of the eye. This, of course, interferes with vision, and they frequently go to the optometrist to have their eyes examined, thinking their defect is due to the need for glasses. If the optometrist is versed in pathology and the other conditions that are required by the laws of this state, he should be in position to determine that this is not a case for glasses but a case of some disease and then refer that patient to the physician. That condition could not be determined if you merely had a case or frame and put in different glasses and tested out the eye. A delay in that matter might be serious. If we have a nervous condition of the patient, and a refractive error, this is one of the leaks of the nervous system, and proper correcting lenses will frequently benefit the general nervous system and in that way prevent further development of epileptic condition. These conditions of the eye may be determined by the instruments mentioned by Dr. Waugh, that is, by looking into the eye itself by the aid of these instruments.

For the plaintiff in error there was a brief by *Aarons & Niven,* attorneys, and *Armand J. Tuteur,* of counsel, all of Milwaukee, and oral argument by *Mr. Tuteur* and *Mr. Charles L. Aarons.*

For the defendant in error there was a brief by the *Attorney General, J. F. Baker,* assistant attorney general, *Winfred C. Zabel,* district attorney, and *Arthur H. Bartelt,* assistant district attorney; and the cause was argued orally by *Mr. Baker* and *Mr. Zabel.*

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OWEN, J. Plaintiff in error, hereinafter called appellant, was convicted of a violation of the statute regulating the practice of optometry, which prohibits the same without first having secured a license therefor, as provided by the act. His principal defenses are (1) that he did not violate the act, in that the proof did not show he was practicing optometry as defined therein; and (2) that the act is unconstitutional. The act was first enacted as ch. 488, Laws 1915, and, as amended by sec. 80, ch. 14, and sec. 2, ch. 357, Laws 1917, appears in the Statutes as sec. 1435*f*—35.

It seems proper first to consider whether the law is a constitutional enactment. In this day it is but trite to say that the state may legislate in the interest of the public health and to protect its citizens from the fraud and imposition resulting from the practice of a trade or profession, calling for skill and learning, by those who are incompetent. Statutes requiring those who hold themselves out as competent to serve the public, as lawyers, physicians, dentists, osteopaths, pharmacists, plumbers, barbers, and the like, to prove their competency before, and secure a license from, some public authority, to engage or continue in their calling, are sustained by virtue of this power. Although the regulation of the practice of optometry is a comparatively recent idea, upwards of forty states of the Union, as we are informed by appellant's brief, have legislated upon the subject. This is indicative of a decidedly preponderating opinion on the part of the American people on the subject and indicates that the legislation under consideration is not the product of legislative caprice. It appears, too, that this class of legislation has received quite general acquiescence on the part of those affected thereby, as we have been referred to but two cases (*McNaughton v. Johnson*, 242 U. S. 344, 37 Sup. Ct. 178, and *People v. Griffith*, 280 Ill. 18, 117 N. E. 195) in which laws of this nature have received judicial consideration. An extended review of these cases will serve no good purpose, as in the *McNaughton Case* the power of the state of

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California to enact the law was not considered, although it seems to have been assumed; and in so far as the *Griffith Case* denies the power of the state to enact such legislation we are not impressed with the logic thereof.

If the practice of optometry bears some real relation to the public health, or if it calls for special skill and knowledge on the part of those practicing it, so that the people should be protected from fakirs and incompetents who hold themselves out as competent to engage therein, then the legislation is within the power of the state. That it does have a real and direct bearing upon the public health cannot be doubted. There are many ailments that are attributable to defective eye-sight which disappear when the vision is corrected by properly-fitting glasses. To properly diagnose and prescribe for the particular defect from which the patient is suffering requires a knowledge of the anatomy of the eye as well as the subject of physical optics, being that branch of the general subject of physics which deals with the action or effect of lenses on light and how light is directed, reflected, and refracted. It also requires familiarity with the spectrum, the ophthalmoscope, the retinoscope, the ophthalmometer, and the phorometer. If this is not a matter of common knowledge, it is supplied by the expert testimony taken in the case, a portion of which is set out in the statement of facts. By a reference to this testimony we are further informed that glasses which satisfy the patient are frequently improper, and that glasses which at the time do not seem comfortable should be insisted upon. With these facts in mind, it is apparent that a person lacking in the requisite degree of skill and learning who holds himself out as competent to practice optometry might bring harm rather than benefit to those who consult and confide in him. In the interest of the public welfare and to protect the citizens from such impositions it is competent for the state to require that those assuming to practice the profession shall possess a specified minimum degree of skill and learning. The legislation is, therefore, within the police power of the state.

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While this law prevents many who were engaged in the practice of optometry at the time of its enactment from a continuance thereof, it is well settled that it is not, for that reason, *ex post facto,* which is one of the grounds urged against its validity. *Hawker v. New York,* 170 U. S. 189, 18 Sup. Ct. 573; *Reetz v. Michigan,* 188 U. S. 505, 23 Sup. Ct. 390; *Nelson v. State,* 167 Wis. 515, 167 N. W. 807. Neither does it take property without due process of law, as urged. Laws similar to this, by which persons engaged in the practice of a trade or profession have been prohibited from the further pursuance thereof until their competency was demonstrated and they received a license so to do, have been frequent. The right of the legislature thus to deprive citizens of the right of pursuing their chosen callings has been fully established and universally recognized. A no more authoritative or illuminating statement upon this question can be found than the remarks of Mr. Justice FIELD in the case of *Dent v. West Virginia,* 129 U. S. 114, 9 Sup. Ct. 231, where he said:

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one

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means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific or otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

It is also suggested that the law is invalid because it permits persons to select their own glasses when, as the evidence shows, harm may result therefrom. This is akin to an argument that the law regulating the practice of medicine is void because it does not prohibit the individual from buying a standard or patent remedy for a common ailment. At the risk of dignifying the suggestion we will say, in the first place, that the legislature has not assumed to protect the individual from his own folly. The legislation merely aims to secure a minimum of knowledge on the part of those who hold themselves out as competent to practice optometry. In the second place, an attempt of the legislature to suppress or minimize an evil is not to be held innocuous because it does not entirely eradicate it.

"It is established by repeated decisions that a statute aimed at what is deemed an evil is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see." *Keokee C. C. Co. v. Taylor,* 234 U. S. 224, 34 Sup. Ct. 856.

"Legislatures have the constitutional power to make unwise classifications." *Heath & Milligan M. Co. v. Worst,* 207 U. S. 338 (28 Sup. Ct. 114), at p. 357.

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"In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things." *Ozan L. Co. v. Union Co. Nat. Bank,* 207 U. S. 251 (28 Sup. Ct. 89), at p. 256.

"It is no sufficient argument against this or any classification that it either may or does exclude individuals as well or better qualified than some which it includes." *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561.

"Nor is classification to be condemned by the courts because the situation of certain individuals in one class may not differ materially from the situation of certain individuals in another class. Such is frequently the case. It is the class, considered broadly as a class, which must possess the distinguishing differences of situation calling for different legislation, not every individual in the class." *Kiley v. C., M. & St. P. R. Co.* 142 Wis. 154, 159, 125 N. W. 464.

These, among other authorities which might be cited almost indefinitely, thoroughly establish the proposition that as to matters of classification the legislature has a very broad discretion, and that its judgment with reference thereto will be respected and enforced by the courts unless the classification is so arbitrary that there is no conceivable basis in reason therefor.

The foregoing also disposes of the objection that the law is void because physicians and surgeons, and persons who sell spectacles without attempting to test the eyes, are exempted from the provisions of the law. The propriety of the exemptions is so manifest that discussion of the reasons therefor would be but to attempt to demonstrate the obvious.

Sub. 6, sec. 1435*f*—35, Stats., provides that

"Any person who has been admitted to practice optometry in any other state may be permitted to practice optometry in this state, in the discretion of the board, upon payment of a registration fee of ten dollars and production of a certificate showing that he has passed an examination in such other state, and has actually practiced optometry therein for a term of two years."

Appellant claims that this amounts to a discrimination against residents of this state because the act favors non-

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residents. We do not think so. The legislature simply demands of every person engaged in the practice of optometry in this state certain qualifications. It has declared how such qualifications may be ascertained. As to those who reside within this state, and all others for that matter, they may be ascertained by the examination provided for in the law. This, however, is not the exclusive way. The legislature has seen fit to declare that a certificate of examination from another state may be taken as evidence in this state that the person presenting such certificate does have the qualifications required. This is not unusual. For instance, the statutes of this state prescribe three distinct methods by which the qualifications of persons to practice law may be demonstrated. One is an examination by the state board of bar examiners. Another, a diploma of the law department of the University of Wisconsin. A third, a certificate of admission to practice in the court of last resort of another state, together with proof that the applicant has been engaged in the actual practice in such state for five years within the last eight years prior to filing his application. It has never been suggested that this amounts to a discrimination by or against any one. Manifestly it amounts to but three different ways by which the qualifications of those desiring to enter upon the practice of law may be ascertained. Similarly the law in question provides two ways in which that fact may be demonstrated. We see no reason why the legislature may not make a certificate showing that the applicant has passed an examination in another state proof of the fact that he possesses the qualifications requisite under the law of this state.

The next question is whether the evidence shows a violation of the law. The law defined the practice of optometry as "The employment of any means, other than the use of drugs, for the measurement of the powers of vision and the adaption of lenses for the aid thereof." Sub. 1, sec. 1435*f*—35, Stats. 1917. Did appellant employ any means

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other than the use of drugs for the measurement of the powers of vision and the adaption of lenses for the aid thereof? We are satisfied that this should be answered in the affirmative. This was not a case where a customer simply picked out her own glasses by trying on pair after pair until she found a pair which satisfied her. She first went to his office, but, because he was not there, she was unable to procure her glasses. It appears, however, that his wife was there, and had it not been her purpose to have her eyes tested she might as well have picked out a pair of glasses without his presence. She did not do so, but left word that he should go to her home. He did so. "He put a big frame on my face and tested my eyes." "He gave one of my girls a card and they had to stand far away." "He asked me if I could see, and every time he would put a different glass on. He asked me to read as far as I could, until finally he found that my eyes was good, and then he gave me a pair of even glasses." The "big frame" testified to suggests the try-frame, which is one of the instruments used by optometrists for the measurement of the powers of vision. When we consider that the appellant is here insisting that he has a right to practice optometry and that the law which prohibits him from doing so is void; that he has taken three unsuccessful examinations for the purpose of securing a license therefor, coupled with the evidence above referred to, the inference that he used the big frame and the test card "for the measurement of the powers of vision and the adaption of lenses for the aid thereof" is justifiable.

Appellant raises a question concerning the construction of the statute which should be mentioned. Sub. 17 of the act (sec. 1435*f*—35, Stats. 1917) provides, in effect, that every person who shall practice optometry after the 1st day of January, 1916, without having obtained a certificate of examination and of registration, or who, not having obtained such certificate, *shall hold himself out to the public as qualified to engage in the practice of optometry* as defined in

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this section, shall be guilty of a misdemeanor, etc. Sub. 19 provides that "Nothing in this section shall be construed to apply to physicians and surgeons authorized to practice under the laws of this state, nor to persons who shall sell spectacles from an established place of business without attempting to test the eyes." It is argued that one who sells spectacles without attempting to test the eyes is exempt from the provisions of the law, therefore a person who sells spectacles in that way may hold himself out to the public as qualified to engage in the practice of optometry and the public may be misled in the belief that they were purchasing spectacles from a skilled and qualified optometrist. It is quite apparent that the legislature did not intend any such result. It was the purpose of the legislature to prevent any one from holding himself out to the public as qualified to engage in the practice of optometry. It was also quite plainly the intent of the legislature to permit persons to sell spectacles so long as they did so without attempting to test the eyes. To permit one who sells spectacles, without attempting to test the eyes, to hold himself out to the public as qualified to engage in the practice of optometry, would of course be absurd, and statutes are not to be so construed as to result in an absurdity. *State ex rel. Husting v. Board of State Canv.* 159 Wis. 216 (150 N. W. 542), at p. 227.

In the construction of statutes we should "look to the whole and every part of the law, to the intent apparent from the whole, to the subject matter, to the effect and consequences, to the reason and spirit, and thereby ascertain the ruling idea present in the legislative mind at the time of its enactment, and then, if the manifest purpose of the lawmakers can thereby be reasonably spelled out of the words they used to express it, to give effect to such purpose, though the meaning thus adopted be quite contrary to the literal sense of the words." *Wis. Ind. School v. Clark Co.* 103 Wis. 651 (79 N. W. 422), at p. 659; *State ex rel. McGrael v. Phelps,* 144 Wis. 1, 128 N. W. 1041. The intent of the legislature in passing this law is not difficult of ascertain-

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ment. It was intended to prevent any one from practicing optometry, or from holding himself out as competent to practice optometry, until a license to do so had been secured as provided in the act. It was also intended to exempt from the provisions of the law persons who simply sold spectacles over the counter, where the customer makes his own selection and there is no attempt on the part of the salesman to test the eyes. We so construe the statute.

It follows from what has been said that we discover nothing invalid about the law, and that the proof shows that the appellant violated it. It follows that the judgment should be affirmed.

By the Court.—Judgment affirmed.

BASSETT, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

November 9, 1918—April 2, 1919.

Commerce: Interstate shipments: Bill of lading and published rates, when binding: Connecting carriers: Responsibility for loss or damage: Valuation as limit of recovery: Negligence: Joint tortfeasors: Supreme court: Jurisdiction, when ceases: Motions for rehearing: Failure of counsel to call attention to statutes.

1. Under the Carmack amendment (of June 29, 1906) to the interstate commerce act (34 U. S. Stats. at Large, ch. 3591, p. 595), the carrier receiving property for interstate transportation was required to "issue a receipt or bill of lading therefor," and this constituted the contract between the shipper and all the carriers participating in the service.
2. The published rates prescribed by said act, based upon valuation, were presumed to be equally within the knowledge of carrier and shipper, and both were bound by them as a matter of law.
3. While the receiving carrier was responsible, under said statute, for the whole carriage, each participating carrier might be sued for loss or damage occurring on its own line, and the liability of the carrier sued was fixed by the applicable valid terms of the original bill of lading.

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4. Under said statute, where the parties to an interstate shipment agreed upon a valuation of the property, for the purpose of determining the rates to be charged, or where the shipper paid an alternative rate based upon a certain valuation, such valuation limited the amount which he might recover for loss or damage due to defaults of the carriers; and it was immaterial whether such loss or damage was caused by ordinary negligence or by gross negligence as defined in the law of this state. *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, so far as it conflicts herewith, overruled.
5. Where damage to property in the course of interstate transportation was caused by concurring negligence of the delivery carrier and of a preceding connecting carrier, they were joint tortfeasors and each was responsible for the entire result, the shipper's recovery, however, not to exceed the amount limited as above stated.
6. Under sec. 3071, Stats., the jurisdiction of this court in a case brought here by appeal or writ of error ceases at the end of sixty days from the date of its decision of the case, even though the clerk has not actually remitted the papers to the lower court, unless such papers have been retained by order of this court made within said sixty days.
7. After the jurisdiction of this court has so terminated, an order therein opening the default of a party to move for a rehearing and permitting him to file such a motion is a nullity.
8. Although, owing to the omission of counsel for both parties to call attention to the Cummins amendments (of March 4, 1915, and August 9, 1916) to the interstate commerce act, the decision and judgment in this case were based upon the law as it existed prior to such amendments, yet, no order directing retention of the record and no application for relief by way of a motion for rehearing or otherwise having been made within sixty days after such decision, this court is powerless to reopen the case and determine the rights of the parties under said amendments.

APPEAL from a judgment of the municipal court of Langlade county: T. W. HOGAN, Judge. *Modified and affirmed.*

This action was brought by the plaintiff to recover damages for injuries alleged to have been suffered by a race horse belonging to him while in shipment from Ottawa, Illinois, to Manitowoc, Wisconsin.

The complaint alleges in substance that at 6 p. m. August 14, 1917, a race horse, a mare, valued at $1,000, was de-

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livered to and accepted by the Chicago, Rock Island & Pacific Railway Company at Ottawa, Illinois, for shipment *via* it and the defendant railroad to Manitowoc, Wisconsin; that the mare was in perfect condition when delivered to the railway company; that she was immediately loaded in a car and remained in that car without unloading for food or water, rest, or exercise, and that she was not properly watered in the car before she arrived at Manitowoc on August 20th, having been in the car continuously for six days; that the mare, at time of shipment, was in racing form and was shipped for the purpose of entering the races at Manitowoc and other points; that the agent at Ottawa, Illinois, was notified at the time of the acceptance of the mare that she was a race horse and that plaintiff expected to use her for the purpose of racing; that it was the duty of the railroad companies, including the defendant, to care for the animal properly and to unload and rest, feed, and water her at least once in every twenty-eight hours for a period of five hours, as required by the provisions of sec. 4386, R. S. of U. S.; that, disregarding these duties, the railway companies, including the defendant, allowed the horse to remain in the car in which it was loaded at Ottawa for a period of five days and nineteen hours without furnishing her sufficient water to sustain her; that as the result of such carelessness and negligence the mare was permanently injured; that the plaintiff expended large sums for the care and nursing of the animal; that the mare has ever since been unfit for service of any kind either as a race horse or driving horse. Damages to the sum of $1,000, together with the costs and expenses of the action, were demanded by the plaintiff.

The defendant denies that the mare was injured by any negligence or carelessness on its part, and alleges that among other terms and provisions of the written contract under which the mare was accepted for shipment were the following: that the Chicago, Rock Island & Pacific Rail-

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way Company "will transport for the second party . . . one mare, value $150;" and that "the second party shall assume all risk and expense of feeding, watering, bedding, and otherwise caring for the live stock covered by this contract while in cars, yards, pens, or elsewhere, and shall load and unload the same at his expense and risk;" and "that the first party shall be exempt from all liability for loss, damage, or injury to the person or persons or live stock covered by this contract arising from derailment, collision, fire, escapement from car, heat, suffocation, overloading, crowding, maiming, or other accidents or causes of any kind or character, *unless such loss, damage, or injury is the direct result of negligence on the part of the carrier.*"

The defendant further alleges that any duty on the part of the Chicago, Rock Island & Pacific Railway Company or the defendant to unload the mare from the car for rest, food, and water was abrogated and modified by an indorsement in writing upon the contract of shipment by which it was mutually agreed that the mare was to be fed and watered in the car; that the mare was carried in a car in which it would and did have proper food, water, space, and opportunity to rest, without the necessity of being unloaded; that the mare was not in the defendant's possession or carried by it for a longer period than twenty-eight hours without food and water.

The jury found, by a special verdict, that the mare was injured while in transit; that such injuries were not caused by a want of ordinary care on the part of the defendant, but by a reckless or wanton neglect of duty on the part of the defendant; that such reckless or wanton neglect of duty was the proximate cause of the mare's injuries; that the consignor and the agent of the Chicago, Rock Island & Pacific Railway Company did not agree upon $150 as the value of the mare; and that $821.80 was reasonable compensation to the plaintiff for the damage he sustained.

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Judgment was rendered in favor of the plaintiff for $920.14, damages and costs. Appeal is taken from this judgment.

For the appellant there was a brief by *Edward M. Smart,* and oral argument by *R. N. Van Doren,* both of Milwaukee.

Arthur Goodrick of Antigo, for the respondent.

The following opinions were filed December 3, 1918:

SIEBECKER, J. The rights and liabilities of the parties to this action are governed by the act of Congress of June 29, 1906, regulating interstate commerce. By sec. 20 of this act (Carmack Amendment, 34 U. S. Stats. at Large, 584, ch. 3591) Congress has fixed the liability of carriers respecting loss and damage of interstate shipments. This legislation has been repeatedly declared by the federal supreme court to supersede state regulation on the subject and to provide a uniform system of regulation and rules fixing the liability of interstate carriers and prescribing the effect of bills of lading. *Adams Exp. Co. v. Croninger,* 226 U. S. 491, 33 Sup. Ct. 148; *Kansas City S. R. Co. v. Carl,* 227 U. S. 639, 33 Sup. Ct. 391; *Missouri, K. & T. R. Co. v. Harriman,* 227 U. S. 657, 33 Sup. Ct. 397.

In the *Croninger* and other cases the provisions of the Carmack amendment were held to impose on the initial carrier liability for loss and damage caused by any connecting carrier as well as for its own defaults, and that its contract of shipment is binding on all carriers for the entire transportation. *Cleveland, C., C. & St. L. R. Co. v. Dettlebach,* 239 U. S. 588, 36 Sup. Ct. 177; *Georgia F. & A. R. Co. v. Blish M. Co.* 241 U. S. 190, 36 Sup. Ct. 541.

Under the act every initial carrier is required "to issue a receipt or bill of lading" upon receipt of a shipment, which constitutes the contract between the shipper and all the carriers. Under the act the parties may agree upon a valuation of the property shipped for the purpose of charg-

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ing the published rates prescribed under the act, based upon valuation, and a carrier is obligated to charge such rates to carry out the purposes of Congress in regulating interstate transportation to secure uniformity of rate and prevent unjust discrimination. Such published rates are presumed to be equally within the knowledge of carrier and shipper, and both are bound by them as a matter of law. *Chicago & A. R. Co. v. Kirby,* 225 U. S. 155, 32 Sup. Ct. 648; *Kansas City S. R. Co. v. Carl,* 227 U. S. 639, 33 Sup. Ct. 391; *Boston & M. R. Co. v. Hooker,* 233 U. S. 97, 34 Sup. Ct. 526; *Great Northern R. Co. v. O'Connor,* 232 U. S. 508, 34 Sup. Ct. 380.

In the *O'Connor Case* the court declared:

"But so long as the tariff rate, based on value, remained operative, it was binding upon the shipper and carrier alike, and was to be enforced by the courts in fixing the rights and liabilities of the parties. The tariffs are filed with the commission and are open to inspection at every station. In view of the multitude of transactions, it is not necessary that there shall be an inquiry as to each article, or a distinct agreement as to the value of each shipment. If no value is stated, the tariff rate applicable to each state of facts applies. . . . If sued for their loss it [the carrier] is liable only for the loss of what the shipper had declared them to be in class and value."

The connecting carrier's liability to a shipper was considered in *Missouri, K. & T. R. Co. v. Ward,* 244 U. S. 383, 37 Sup. Ct. 617, and it was there held:

"While the receiving carrier is thus responsible for the whole carriage, each connecting road may still be sued for damages occurring on its line; and the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading." *Bichlmeir v. M., St. P. & S. S. M. R. Co.* 159 Wis. 404, 150 N. W. 508; 10 Corp. Jur. § 894, p. 541.

It is obvious that the shipment of this mare was an interstate shipment and that the provisions of the interstate commerce act apply. There is no dispute but that the ship-

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per paid an alternative rate based on a $150 valuation of the mare. This legally limits the amount plaintiff is entitled to recover for loss and damage to her for any defaults of the carriers in transporting her to destination. In view of the state of the case on this point it is immaterial whether the alleged damage was the proximate result of ordinary or gross negligence as defined in the law of this state.

The defendant contends that there is no evidence in the case to support the finding of the jury that defendant was guilty of either gross or ordinary negligence. We have examined the evidence and find that the evidence tending to show the condition of the mare upon her arrival at Manitowoc was sufficient to warrant an inference by the jury that she had not been properly cared for during shipment and that such condition was attributable to a lack of water and food combined. If the mare was in fact mistreated as alleged, then such mistreatment is partly attributable to the carrier who had charge of her before defendant received her as delivery carrier; but this fact cannot affect defendant's responsibility to the shipper for the whole damage. Under such a state of facts the carriers are joint tortfeasors.

"Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it. . . . It is not necessary that they be acting together or in concert if their concurring negligence occasions the injury." 38 Cyc. 488, 489, and cases cited in the note; 10 Corp. Jur. § 894, p. 542; *Baltimore & O. S. W. R. Co. v. J. A. Wood & Co.* 130 Ky. 839, 850, 114 S. W. 734; *Georgia F. & A. R. Co. v. Blish M. Co.* 241 U. S. 190, 36 Sup. Ct. 541.

It follows that the plaintiff is entitled to recover his damage to the mare from this defendant as a joint wrongdoer, not to exceed, however, $150 in amount, this being the valuation recognized by the published tariffs, rates, and

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rules, pursuant to the interstate commerce act as corresponding to the freight rate he paid for this shipment.

In *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, 136 N. W. 794, this court disregarded the published tariffs, schedules, and classifications as to alternative rates based on valuation of the articles shipped, and allowed recovery of the value of the shipment in excess of the value limited by the rate paid for the shipment. In so far as this case conflicts with the rule of the federal cases above cited, it must be deemed overruled.

By the Court.—The judgment appealed from is modified by limiting plaintiff's right to recover damages to the sum of $150, and as so modified the judgment is affirmed. The appellant to recover costs and disbursements in this court.

KERWIN, J. *(dissenting in part).* I cannot agree with so much of the opinion as holds or intimates that *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, 136 N. W. 794, should be overruled. In that case it was established as a basis of the opinion that through mistake or inadvertence the value of the property was inserted in the bill of lading at about one tenth of its value. In other words, there was no agreement for a one-tenth valuation or any valuation less than the true value.

In my opinion the *Tradewell Case* is in harmony with the letter and spirit of the Carmack amendment to the Hepburn act and is not in conflict with the case at bar.

On February 4, 1919, the respondent moved for leave to open the default in moving for a rehearing and to make a motion for rehearing in the cause. The motion was argued by *John B. Sanborn* of Madison for the respondent and by *R. N. Van Doren* of Milwaukee for the appellant.

An order was entered allowing respondent's attorney to file such motion for a rehearing, and it was further ordered that the record be retained in this court pending said motion.

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Upon the motion as filed there were briefs by *Arthur Goodrick* of Antigo, attorney for the respondent, and by *R. N. Van Doren* of Milwaukee, attorney for the appellant; and a brief was also filed by *H. C. Lust* of Chicago as *amicus curiæ*.

The following opinion was filed April 2, 1919:

PER CURIAM. On February 4, 1919, the court entered an order opening the default and permitting the respondent to file a motion for rehearing. The appellant challenges the jurisdiction of the court to make such order.

When the motion for opening the default was brought to the attention of the court, and objection to the court's jurisdiction was formally entered on the record, no discussion of the question was had nor was it considered by the court, and the application was granted without inquiry on the point suggested. If appellant's contention is correct, then the court is without power and the order is ineffectual and a nullity. Sec. 3071, Stats., provides:

" . . . The clerk of the supreme court shall remit to such court [from which appeal is taken] the papers transmitted to the supreme court on the appeal or writ of error, together with the judgment or decision of the supreme court thereon, within sixty days after the same shall have been made, unless the supreme court, on application of either of the parties, shall direct them to be retained for the purpose of enabling such party to move for a rehearing."

Rule 37 of this court provides that every motion for a rehearing must be filed within thirty days after the decision, and Rule 38 requires that when such a motion is filed the papers in any case shall be retained by the clerk until the motion is disposed of. The decision of this case in this court was rendered December 3, 1918; the time for filing a motion for a rehearing expired January 2, 1919; and the sixty days for the clerk to remit the papers in the case to the court from which the appeal was taken expired February 1, 1919. There was no order made within these sixty

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days by this court, upon the application of either party, under sec. 3071, Stats., directing that the papers in the case be retained in this court for any purpose.

On February 4, 1919, the day on which respondent moved the court to open the default and grant him leave to file a motion for a rehearing, such an order was made by the court. This was, however, three days after the sixty days had expired within which the clerk of this court was required by sec. 3071, Stats., to remit the papers in the case to the lower court. It was expressly held in *Hocks v. Sprangers,* 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113; *Murphy v. State,* 131 Wis. 420, 111 N. W. 511; *Ott v. Boring,* 131 Wis. 472, 110 N. W. 824, 111 N. W. 833; and *Pringle v. Dunn,* 39 Wis. 435, that the jurisdiction of this court ceases at the end of the sixty days from the date of the decision of the case by virtue of the provisions of sec. 3071, Stats., even when the papers are not actually remitted, unless they are retained by the order of the court.

As stated in the *Pringle Case:*

"The statute itself regulates our jurisdiction; not the compliance or the noncompliance of the clerk with its provisions. The mere omission of the clerk to remit the record, the mere accident that the appeal papers remain here notwithstanding the statute, cannot operate to continue the jurisdiction of the court against the words of the statute."

Since no order was obtained from this court within the sixty days from the decision of the case directing that the papers in the case be retained here for the purpose of opening the default for filing the motion for a rehearing by respondent, it necessarily follows that this court was without jurisdiction on February 4, 1919, when it directed that an order be entered that the default be opened, and hence such order is a nullity and the court now has no jurisdiction to entertain the respondent's motion for rehearing in this court. If the decision and judgment in this court leaves respondent remediless to present his rights under the Cummins amendment of August 9, 1916, to the interstate com-

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merce act as amended by the Carmack amendment, we deplore that the necessary steps under the statute were not taken by counsel to retain jurisdiction of the case in this court and that this court has been rendered powerless to examine the record to ascertain whether or not an error had been committed in the trial of the case and before this court as the result of an omission on his part to present all the material facts under the issues raised by the pleadings and the provisions of the Cummins amendment of August 9, 1916. The case was presented to this court by counsel of both parties upon the theory that the rights and obligations of the respective parties were governed by the provisions of the Carmack amendment to the interstate commerce act. No allusion was made to the fact that this act had been amended twice since the Carmack amendment, which materially changes this statute as to the rights of the carrier to limit its liability for damage to property in the course of transportation. It is now claimed that a point not litigated in either court should have been presented, namely, that the defendant, under the Cummins amendment of August 9, 1916, had not been authorized or required by order of the interstate commerce commission to adopt a released rate, and that the tariff under which the shipment in this case moved is not legal and effectual and hence does not operate to restrict plaintiff's recovery of damages to the specified amount of $150. The observation made by this court in the *Pringle Case* may with profit be repeated here:

"In the decision of causes before us, we must depend largely on the presentation of them by counsel. . . . If we find points not raised at the bar, we pass upon them. But if, as a rule, we should decline all reliance on the investigations of counsel, and assume to wade through all the records coming before us for all possible points arising upon them, and so perform over again the duties of the bar, we should at once so far fail in our own duties as to delay justice, which would sometimes be equivalent to denial of justice. . . . And if parties claim to have suf-

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fered by mistake or neglect of counsel, and seek redress through the same or other counsel, they must do so with such diligence that they can overtake the jurisdiction of the court in the cause; so that they may be again heard without overriding the rules of law which go to the peace of society by the final end of litigation."

Concededly the decision in this case was bottomed upon the grounds that the case was governed by the interstate commerce act before it was modified by the Cummins amendments of March 4, 1915, and August 9, 1916. If the fact is that the defendant under this act was required to obtain, by order of the interstate commerce commission, the right to adopt alternative rates based on declared values of the shipment, and that it has not done so, upon which point the record is silent, then the decision that the plaintiff is restricted in his recovery to the declared value of the shipment would be inapplicable to the actual facts of the case. But under the facts and circumstances above stated we are powerless to grant any relief to reopen the case for retrial to ascertain what the true state of facts on this point is.

The motion is therefore denied, without costs.

VAN DE ZANDE, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

December 6, 1918—April 2, 1919.

Master and servant: Injury to railway employee jumping from box car: Unsafe working place: Question for jury.

Where a railway section hand was injured by jumping to the ground (a distance of about fifty-four inches) from the doorway of a box car in which he had been working, a finding by the jury that the injury was caused by the railway company's failure to furnish him a place of employment which was as free from danger as the nature of the employment reasonably permitted was within the jury's province and should not be disturbed. VINJE, KERWIN, and ROSENBERRY, JJ., dissent.

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APPEAL from a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Affirmed.*

The plaintiff, a man about forty years of age, had been for many years a section hand for defendant and claimed to have been injured July 28, 1916, by jumping to the ground from the doorway of a box car in which he had been working unloading ties. His work required him and the others to frequently get in and out of such cars. He being five inches shorter than the average man, frequently received assistance by way of boosting in getting into such cars. On this occasion he did, as he had frequently done and as he had seen others do, stoop down at the open door, place one hand upon the floor of the car, which was about fifty-four inches high, and then jump to the ground between two tracks there, and alighting on both feet he felt a sharp pain in his left hip. There was medical testimony from which it might be found that such jolt or jar might have resulted in the permanent impairment in the use of and pain suffered in his left leg to which he testified.

The jury by special verdict found that the proximate cause of his injuries was defendant's failure to furnish him a place of employment which was as free from danger to his safety as the nature of the employment reasonably permitted, and from judgment in plaintiff's favor upon such verdict for the amount assessed for his damages defendant appeals.

For the appellant there was a brief by *Edward M. Smart,* attorney, and *R. N. Van Doren,* of counsel, both of Milwaukee, and oral argument by *Mr. Van Doren.*

For the respondent there was a brief by *Kaftan & Reynolds* of Green Bay, and oral argument by *R. A. Kaftan.*

The following opinions were filed January 7, 1919:

ESCHWEILER, J. The plaintiff's employment at the time of the injury not being within the field of interstate com-

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merce, and it being conceded that the parties were not subject to the provisions of the workmen's compensation act, this appeal presents but the very narrow question as to whether the trial court should have held as matter of law that plaintiff's injuries were not caused by any violation by defendant of the statutory obligations toward plaintiff imposed upon it by secs. 2394—48, 2394—49, Stats.

These statutes provide, among other things, that the employer "shall furnish a place of employment which shall be safe for employees therein, . . . shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees;" that "no employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employers shall . . . fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees."

The absolute nature of the statutory obligations thereby placed upon the employer of labor as to the safety of place, process, and method in and about the employment, and that the regulation applies as well to the place where the employment is carried on, as here, but temporarily, as well as to the place of continuous or permanent employment, by sub. (1), sec. 2394—41, Stats., all has been so often stated that it is unnecessary now to either paraphrase or repeat what has been so repeatedly decided by this court. *Kielar v. Fred Miller B. Co.* 165 Wis. 237, 241, 161 N. W. 739; *Sullivan v. C., M. & St. P. R. Co.* 163 Wis. 583, 158 N. W. 321; *Mayhew v. Wis. Z. Co.* 158 Wis. 112, 147 N. W. 1035; *Murphy v. Interlake P. & P. Co.* 162 Wis. 139, 155

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N. W. 925; *Kelly v. Kneeland-McLurg L. Co.* 161 Wis. 158, 152 N. W. 858; *Kuligowski v. Kieckhefer B. Co.* 160 Wis. 320, 151 N. W. 808; *Kendzewski v. Wausau S. F. Co.* 156 Wis. 452, 146 N. W. 516; *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 144 N. W. 650.

That countless thousands of railroad employees and others have undoubtedly made just such exits from box cars without receiving injuries; that such a method of making a descent is so similar to that pursued so successfully and repeatedly and almost from an equal height from time immemorial by the farmer boy who, jocund, leaps with the lark at break of day, and, still jocund, leaps from his wagon at the dinner horn's bray; that the drop in the space between the floor of the car and the ground may be so materially lessened by the apparently simple expedient of either by an anterior or posterior outward exposure of the body allowing the legs to dangle down the side of the car and then sliding the balance of the way, all present such considerations as to give great weight to appellant's contention here; that contention being that under our decisions upon the statutes herein involved, the master is not an insurer of the safety of the employee, but only such as to the safety of place or process, and that therefore the employer could not reasonably be expected to anticipate and guard against some such result as here claimed to one who voluntarily chose the greater rather than the lesser of the fields open to him in a practical application of the law of falling bodies, or that injury might result from a method theretofore pursued with seemingly invariable safety.

In view, however, of the rapid changes and improvements in safety of place, process, and methods of employment in the industrial world constantly going on and seemingly in almost geometrical rather than arithmetical progression, and of the imperative language of the legislature, we do not feel that we can say that the situation here is

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one within the domain in which the court must pronounce the final yea or nay as a question of law, rather than one within the province of the jury.

That this is the first recorded occurrence brought to our attention or apparently to be found in the decisions of other jurisdictions of such a peculiar and serious result following such a customary practice, while quite persuasive as an argument against our upholding the decision of the trial court and the jury, yet cannot, of course, of itself be a controlling reason for requiring us to hold that it does not give rise to a liability under this new statute or that from its mere priority it bars the injured one from his otherwise proper relief.

The jury in this case had before them evidence that while the section crew of which plaintiff was a member had furnished to them tools to work with, such as picks and pinchbars, but no ladders, yet that the repair men working alongside them in the same yard had ladders furnished them to climb into as well as upon such cars; they might also have considered that which is matter of common knowledge, that the ends of just such box cars as well as freight cars are supplied with extensions to the side or end ladders in the shape of one or more ladder rungs outside and below the floor or platform of the car, which such extensions, while primarily no doubt for assistance in ascending, yet nevertheless, to the extent of their length, do lessen the height of any drop from the car, and that none such were supplied at the doors of box cars; and furthermore, the facts, also matters of common knowledge, that a great share of the ordinary loading and unloading of merchandise into and from such cars in the traffic for which such box cars are primarily used is done at platforms of the same height as the car floors and needing for such work, therefore, no climbing in or jumping out as was necessary in the use required of them on this occasion. If the jury considered this particular use of box cars as in the nature

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of a special use they may have considered that the furnishing of some special means for getting out of such cars on such an occasion was within the field of the master's duty prescribed by the statute before us.

It was therefore within the province of the jury's discretion to find as it did in answering the first question of the special verdict, and with that exercise thereof we cannot see our way clear to interfere.

By the Court.—Judgment affirmed.

VINJE, J. *(dissenting).* Fortunately there is no divergence of opinion among the members of this court as to the beneficent purpose of our safe-place statute, and fortunately also we all agree that it should receive a liberal construction in order to effectuate that purpose. But unfortunately in its application to particular situations differences of opinion may well, and do at times, arise. This is such an occasion. Bearing in mind that the statute does not impose a duty upon the employer to make the place of employment absolutely safe, but only as free from danger as the nature of the place of employment will reasonably permit (sub. (11), sec. 2394—41), three members of the court have reached the conclusion that in this case the statutory duty had been met by the defendant. The place of employment was a standard box car situated upon a level track on level ground. If it was unsafe, then every standard box car in the country is unsafe in a like situation upon coming within our state. The proposition asserted by the court is that it is not reasonably safe for the average workman to descend from a platform four and one-half feet from the ground without the use of a ladder or steps. The verdict of the jury can have but little weight because the facts are obvious and undisputed. The situation is so simple and common that it addresses itself to one's experience and perception rather than to reason and judgment. Being so simple and common, it is strange that its unsafe

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character should have remained undiscovered till now. We have had nearly a century of railroading. Our legislature and the Congress have passed laws with reference to railroad safety devices. Our railroad commission and the interstate commerce commission in executing such laws have had occasion to go into great detail in their provisions with reference thereto, but none have even considered the subject of providing standard box cars with ladders or steps at the doors for the use of those who load or unload them. But this may have been merely an oversight which the verdict of a jury, approved by the court, is now expected to remedy. Dangers, however, inhere in the cure as well as in the disease, for ladders are treacherous, steps must perforce at times be wet and slippery, and the footing insecure. So at best the remedy is but partial and of doubtful value even if used. That it would be generally used if furnished is by no means certain. That it is necessary is negatived by an experience covering nearly a century and by the fact that at least three modes of exit, each reasonably safe and convenient, may be resorted to. First, the way plaintiff did, by putting the hand on the door-sill and jumping down, no doubt the most natural and usual way; second, by sitting in the doorway with the feet hanging outside and dropping from there to the ground, a distance of about two feet; or, third, by sliding over the door-sill upon the ventral side of the body till the feet reach the ground, and so make the descent without any jar at all. These several easy means of exit would seem to render the place reasonably safe, even if past experience did not record it so. The fact that an injury may occur or has occurred in a certain place does not argue that such place is unsafe within the meaning of the statute, for accidents may happen in the safest of places. At any rate, when it appears that a place has for a very long time been continuously used by a large number of persons without injury to them, it ought not to be char-

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acterized as unsafe because in its use some one may at rare intervals be injured.

KERWIN AND ROSENBERRY, JJ. We concur in the dissenting opinion of Mr. Justice VINJE.

A motion for a rehearing was denied, with $25 costs, on April 2, 1919.

GLATZ, Appellant, vs. KROEGER BROTHERS COMPANY, Respondent.

February 6—April 2, 1919.

Automobiles: Negligence: Death in collision: Right of way: Contributory negligence: Evidence: Physical facts: Changing jury's finding.

1. In an action to recover damages for death of plaintiff's husband in a collision, evidence that the deceased, riding upon a motorcycle on the proper side of the street, approached a street intersection from the west at an ordinary and proper rate of speed, that defendant's truck, coming from the north on the cross street, shot suddenly out from behind a building at a high rate of speed, and that the driver of the truck did not keep a proper lookout, did not have proper control of his machine, and apparently was unmindful of his duty to give the deceased the right of way, was sufficient to sustain a finding by the jury acquitting the deceased of contributory negligence, even if the fact was that the motorcycle ran into the truck.
2. The physical facts as to the marks upon the truck and the motorcycle and the relative positions of the two vehicles and the body of the deceased after the collision did not conclusively show which vehicle ran into the other, and did not, in any view thereof, justify the trial court in changing the jury's finding as to contributory negligence.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

This is an action by the widow of one Cyprian Glatz to recover damages for the death of her husband resulting from a collision between an automobile truck operated by the defendant and a motorcycle on which the deceased was

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riding at about 12:30 p. m. February 9, 1917, at the intersection of Nineteenth and Galena streets in the city of Milwaukee. Galena street runs east and west and Nineteenth street north and south. The deceased was going east on the south side of the roadway on Galena street, and the defendant's truck, driven by an employee, was going south on the west side of Nineteenth street. The two vehicles arrived at the intersection at nearly the same time and violently collided. The claim of the plaintiff is that the deceased reached the point of collision first and was negligently run into by the driver of the truck, while the defendant claims that the truck reached the point first and that the motorcycle ran into its right front wheel. As a result of the collision the deceased was thrown from his motorcycle onto the sidewalk on the east side of Nineteenth street just south of the southeast corner of the intersection of the two streets, and instantly killed. The motorcycle was found in the roadway against the catch-basin at said corner, and the truck stopped on the sidewalk and in the parking space on the east side of Nineteenth street just south of the deceased. There was considerable snow packed hard in the street at the time. The front wheels of the truck were twisted and the axles bent as the result of the machine striking and mounting the curb.

A special verdict was returned by the jury finding (1) that the defendant's driver failed to exercise ordinary care in operating the automobile as it approached the place of collision; (2) that such failure was the proximate cause of the injury to the deceased; (3) that no want of ordinary care on the part of the deceased proximately contributed to cause his death; (4) that plaintiff's damages amounted to $4,500. Upon motion the trial judge changed the answer to the third question from "No" to "Yes," thus finding deceased guilty of contributory negligence, and rendered judgment for the defendant, from which judgment the plaintiff appeals.

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Oscar W. Kreutzer of Milwaukee, for the appellant.

For the respondent there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

The following opinion was filed March 4, 1919:

WINSLOW, C. J. There were but four eye-witnesses of the accident and they were all examined on the trial. Two school girls, aged respectively twelve and fifteen years, were standing on the northeast corner of Galena and Twentieth streets about 300 feet from the place of collision and watched the deceased riding eastward on Galena street until the collision occurred, and both testified that the motorcycle reached the street intersection first and that the truck shot out from behind a building on the northwest corner of Galena and Nineteenth streets, going very fast, and ran into the motorcycle. The driver of the truck testified in substance that he reached the street intersection first, traveling at the rate of twelve or thirteen miles an hour; that he was nearly two thirds of the way across Galena street when the motorcycle came from the west directly toward his machine and made no turn; that he swung the machine directly to the east, but the motorcycle struck his right front wheel and the deceased fell onto the right front fender; that the truck skidded and slewed around one and a quarter times, pivoting on the right hind wheel, on which there was a chain; that when it ceased skidding it was pointing directly east and still had sufficient speed to mount the curb on the east side of Nineteenth street just south of the building line and run onto the sidewalk, twisting the front axles and bending or breaking the radius rods. A wagon-boy sixteen years old, who was riding in the truck and was also an employee of the defendant, testified to substantially the same facts.

Upon this conflicting evidence the jury found the truck driver guilty of negligence and acquitted the deceased from

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contributory negligence. The trial judge, however, reversed the latter finding because the physical facts, *i. e.* the marks on the automobile and the positions of the deceased, the motorcycle, and the truck after the accident, were controlling and demonstrated that the motorcycle ran into the right front wheel of the truck. From this premise he concluded that the deceased was guilty of contributory negligence as matter of law.

We have been unable, after a very careful consideration of the evidence in the case, to agree with either of these propositions, and we shall briefly state why.

The physical facts relied on by the trial court as demonstrating that the motorcycle ran into the automobile were in brief these: Upon the pressed steel hub cap of the right front wheel of the truck was an irregular indentation and just above the indentation five marks, apparently made by contact with the threads of a screw or bolt; on the fender above this wheel was a break of some kind, the nature of which is not clearly disclosed by the evidence; the truck, when it stopped, was facing east with its front wheels on the sidewalk and its rear wheels on the park space on the east side of Nineteenth street just south of the building line on the south side of Galena street, about thirty feet distant from the place of collision; a foot or two north of the truck was the body of the deceased lying on the sidewalk, and the motorcycle was leaning against the catch-basin at the corner of the curb. These relative positions of the truck, the dead man, and the motorcycle were only to be explained, as the trial judge thought, by accepting the testimony of the driver of the truck to the effect that the truck reached the point of collision first and the motorcycle ran head on into the right front wheel of the truck, causing it to pivot on the chained rear wheel, skidding at the same time toward the southeast.

So far as the indentation and the thread marks on the hub cap of the truck are concerned, we cannot regard them as at all conclusive on the question as to which vehicle ran

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down the other. Two expert mechanicians testified that the indentation fitted the nut upon the hub of the front fork of the motorcycle and was apparently made by the nut striking the hub cap. On the other hand, an expert mechanical engineer testified that in his judgment the indentation could not have been made by the nut just mentioned, but that it fitted a foot-rest flange at the rear of the motorcycle and might well have been made by contact therewith. As to the thread marks there did not appear to be anywhere on the motorcycle five exposed thread marks exactly corresponding to the thread marks on the hub cap. The motorcycle itself bears few, if any, marks of a collision such as the defendant's witnesses describe. The nut which is supposed to have made the indentation in the steel cap bears no marks of injury; the right handle-bar is slightly bent downward, and a horizontal steel bar eighteen inches long at the extreme rear of the machine and forming the left side of the rest stand was considerably bent as though it had received a blow of some violence near the middle. No other injuries appear to have been received by the motorcycle.

As to the relative positions of the two vehicles and the deceased after the collision, we cannot regard them as conclusively supporting either theory. The mechanical results of an accident of this kind are sometimes very surprising and hard to explain. It seems to us that in the present case they may be explained fully as reasonably on the theory that the truck ran down the motorcycle as on the theory that the motorcycle ran down the truck; in other words, it is a situation peculiarly appropriate for the judgment of a jury.

But if it were to be conceded that the evidence conclusively establishes that the motorcycle ran into the front wheel of the truck it would not necessarily follow that the deceased was guilty of contributory negligence. It must always be remembered that the deceased had the right of way. He was approaching the street intersection on the proper side of Galena street, and the statute gave him the right of

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way over a driver approaching him from the left on Nineteenth street. Sec. 1636—49, Stats.

The possession of this right does not of course justify the possessor in plunging ahead regardless of consequences nor in failure to exercise ordinary care to avoid injury to others, but the fact is an important one to be considered in deciding the question of negligence. He approaches a crossing expecting and entitled to expect that one approaching from the left will recognize his right, and his conduct is to be judged of in view of that circumstance. *Zimmermann v. Mednikoff*, 165 Wis. 333, 162 N. W. 349.

Remembering this fact, we think it is impossible to say that the plaintiff must be defeated on the ground of contributory negligence simply because of the fact (granting it to be a fact) that the motorcycle ran into the truck. There was ample testimony to show that the deceased was approaching the intersection at an ordinary and proper rate of speed and that the truck shot suddenly out from behind a building at a high rate of speed, the driver apparently being unmindful of his duty to give the deceased the right of way. There was also evidence from which the jury might properly conclude that the driver of the truck approached the crossing very rapidly without keeping the proper lookout to his right and without proper control of his machine.

The answers of the jury seem to us to be founded upon sufficient evidence, we find no prejudicial errors in the rulings on evidence, and it follows that the judgment must be reversed.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the plaintiff for the damages found by the jury as of July 8, 1918.

A motion for a rehearing was denied, with $25 costs, on April 2, 1919.

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BAUMGARTNER, Appellant, vs. CITY OF MILWAUKEE and another, Respondents.

February 7—April 2, 1919.

Injunction: Taxpayer's action: Diversion of public funds: Publication of proceedings of city council: Readvertising for bids.

The expenditure, by direction of a city council, of a small sum in readvertising for bids for the publication of the proceedings of the council, is not such a substantial diversion of public funds as to warrant the interference of a court of equity, by way of injunction, at the suit of a taxpayer. *Mueller v. Eau Claire Co.* 108 Wis. 304, distinguished.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Demurrer. The complaint alleges that the plaintiff is a taxpayer in the city of *Milwaukee,* a municipal corporation, city of the first class; that *Peter F. Leuch* is the city clerk; sets out the provisions of sec. 1, ch. 50, Laws 1903, which authorizes the common council of any city of the first class to publish its proceedings, requires that advertisements inviting bids shall be published, how and when the bids shall be opened, requires the clerk to transmit the proposals to the next regular meeting of the common council, and further provides that the common council shall thereupon at said meeting thereof, by its resolution, designate and award such publication of proceedings to the bidder offering to print such proceedings at the lowest price. "Provided, however, that said common council may in its discretion reject any or all bids so made that by said common council shall be deemed exorbitant, or too high." That in response to an invitation to submit bids the Broadway Press submitted a bid which was the lowest bid offered and was transmitted to a meeting of the common council to be held on the 16th day of April, 1918; that the common council refused to award the contract for the publication of its pro-

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ceedings to the said Broadway Press, and referred the matter to its committee on finance and printing; that said committee held a hearing on April 30th, at which hearing the Broadway Press appeared and offered proof as to its financial responsibility, competency, and reliability to do the work in question. It is alleged that all the testimony offered upon the hearing tended to establish the competency and reliability of the Broadway Press; that thereupon three members of the committee, which consisted of five members, signed a report to the common council which was countersigned by the comptroller, which report recited that the committee objected to letting the bids to the Broadway Press, the lowest bidder, for the following reasons:

"1. It appears that the lowest bidder sometimes employs boys in the performance of his work.

"2. It appears that the lowest bidder has turned out some city and county printing in an unsatisfactory manner.

"3. It appears that the lowest bidder does not observe an eight-hour working day in accordance with the expression of the consensus of this body in the adoption of its eight-hour ordinance on city work.

"4. It appears that the lowest bidder does not uniformly pay the prevailing scale of wages, and this common council wishes to encourage the payment of the prevailing scale of wages."

The complaint further alleges that the report so submitted was adopted and a resolution introduced directing the city clerk to readvertise for bids, which resolution was referred to the committee on finance and printing, where it was pending at the time this action was begun. The complaint then alleges that it was the duty of the common council to let the contract to the lowest bidder, unless the bids were exorbitant or the lowest bidder should prove to be incompetent or unreliable, and alleges that the bids were not exorbitant and that the Broadway Press was competent and reliable; that the report of the committee was made in bad faith, was not in accordance with the fact, and was

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made for the purpose of preventing the Broadway Press from getting the contract because those who made the report were advocating union labor in the printing trade; that the report was the result of a conspiracy on the part of the members of the committee signing it; that the charges made as to the matters set out in the report were false, and that the action of the three members of the committee and the comptroller was pursuant to a prearranged plan to prevent the Broadway Press from securing the contract. The complaint further alleges that if the resolution authorizing the readvertising for bids is adopted the city clerk will readvertise, and that if the city is allowed and permitted to carry out its intentions, moneys in the hands of the city will be diverted for illegally authorized advertising and illegally authorized printing and large sums of money will be misappropriated and the city will incur a large indebtedness; that plaintiff has no adequate remedy at law and will have no legal remedy, and asks that the city clerk be perpetually enjoined and restrained from entering into any contract or incurring any liability for the publication of any notice or advertisement for bids, and for further special and general relief.

The defendants demurred to the complaint; the demurrer was sustained, and from the order sustaining the demurrer plaintiff appeals.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Arthur B. Doe,* of counsel, all of Milwaukee, and oral argument by *Mr. Doe.*

For the respondents there was a brief by *Clifton Williams,* city attorney, and *Walter J. Mattison* of Milwaukee, of counsel, and oral argument by *Mr. Mattison.*

ROSENBERRY, J. We are met at the threshold of this case by the objection that the plaintiff taxpayer has no right to maintain this action for the reason that the complaint does not show that the public treasury will suffer a sub-

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stantial loss if the proposed action of the city and its clerk be not enjoined.

The allegation of the complaint is, "the city of *Milwaukee* will misappropriate a large sum of money and incur a large indebtedness, and this plaintiff and the taxpayers of said city will suffer great and irreparable injury therefrom." These allegations are very general in their nature and are controlled by the specific allegations in the complaint as to the nature and amount of the threatened diversion of public funds. It must be said that it fairly appears from the complaint that the financial loss to the city if there is a readvertisement for bids will be the cost of the advertisement. Whether the readvertisement will produce a lower or a higher bidder than the Broadway Press, no one can say. If a lower bidder should appear, there will not only be no loss to the city but there will be a saving. If the lowest bidder in response to the readvertisement bids a sum higher than that bid by the Broadway Press, there might be a loss.

It does not appear what the cost of readvertisement will be. We know that it cannot be very much and must be a comparatively small sum.

It is said that *Mueller v. Eau Claire Co.* 108 Wis. 304, 84 N. W. 430, is conclusive as to the right of the plaintiff to maintain this action. In that case it appeared that the county board disregarded the lowest bid and let the contract to the next lowest bidder, the difference in the bids being $3. The right of the taxpayer to maintain the action was questioned and his right affirmed by the court. Speaking of the plaintiff taxpayers there, the court said:

"The fact that their ultimate pecuniary loss may be almost infinitesimal is not controlling. Their right to sue is not based alone upon a direct loss to them in the ultimate winding up of the transaction attacked. It rests rather upon the fact that an illegal contract has been entered into which will require a large amount of the taxpayers' money to satisfy. In other words, a debt has been created without

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warrant of law, and the money of the taxpayer is about to be used for its liquidation. . . . In contemplation of a court of equity, the loss to the county would be the entire amount of the contract price to be paid on the illegal contract, and not the difference between the valid and void contracts."

In this case the court is not asked to enjoin the expenditure of public funds under an illegal contract. The plaintiff does not seek to compel the city to enter into a contract with the Broadway Press, but to prevent the expenditure of public funds for a readvertisement. In a proper case the city unquestionably has the right to readvertise. The sole injury threatened here is the expenditure of public funds for readvertisement.

The injury threatened in this case is not the expenditure of a large amount of public funds on an illegal contract, but to prevent the disbursement of a small amount for advertising. Not every irregular expenditure of public funds will be enjoined at the suit of a taxpayer. Where a taxpayer sought to enjoin the issuance of a county order upon an audited account for services rendered to a poor person for which a town in the county was primarily liable, although the county would be liable over to the town, this court said:

"A taxpayer can successfully invoke the power of a court of equity to enforce a right of a public corporation when there is danger that such corporation will otherwise suffer some substantial injury which to some extent will affect the taxpayer. The power of taxpayers, in such an emergency, to set judicial machinery in motion, is a very valuable right, but it must be kept within those reasonable limits which govern the administration of justice in courts of equity. The wrong existing or threatened must be one that will or may, if not properly met, cause some substantial loss to the corporation, else there is no warrant for calling the equity power of the court into activity." *Ebert v. Langlade Co.* 107 Wis. 569, 573, 83 N. W. 942; *Pung v. Derse,* 165 Wis. 342, 162 N. W. 177.

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The expenditure of a small sum of money for readvertisement is not such a substantial diversion of public funds as would warrant the interference of a court of equity. The council may determine to let the contract to the Broadway Press; it may perhaps decline to publish the proceedings at all. In any event we cannot look into the future and anticipate and regulate future proceedings of the common council.

By the Court.—Order affirmed.

JONES and others, Respondents, vs. CITIZENS' SAVINGS & TRUST COMPANY, Executor, and another, Appellants.

March 4—April 2, 1919.

Claims against decedent: Concurrent jurisdiction of circuit court: Waiver of objections: Contract made by letters: Evidence: Transaction with person since deceased: Witnesses: Competency: Identification by widow of husband's signature: Attorney and client: Contract as to compensation: Construction: Changing finding by jury.

1. As to claims against a deceased person, if the remedy in the court administering his estate is not full and complete the concurrent jurisdiction of the circuit court may be invoked. So *held* in the case of a claim against a partnership where it was desired to proceed against the estate of a deceased partner (which was being administered in an Ohio court) and the surviving partner and also to garnish a debt owing to the partnership by a Wisconsin corporation.
2. Where, in such case, the defendants appeared generally in the action and joined in a counterclaim against the plaintiffs, they waived any objection that the Ohio court had primary jurisdiction of the matter.
3. Where a contract between plaintiffs and a partnership was made by letters between them, those on behalf of the partnership being written by a partner since deceased, such letters are not inadmissible in evidence on the ground that they constituted a "transaction or communication" with a deceased person within the meaning of sec. 4069, Stats. Such letters would not be subject to contradiction by oral testimony of the deceased partner if he were living.

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4. The widow of the deceased partner was competent in such a case to identify the signature of her husband, and her testimony in that respect did not involve any "transaction or communication" with the deceased, within the purview of sec. 4069, Stats.
5. Letters which passed between plaintiffs, who are attorneys at law, and a partnership since dissolved by death of one member, are *held* to show a distinct proposal by plaintiffs, understood and accepted by the partnership, that plaintiffs should be paid a regular scale of prices for services in certain proposed litigation involving infringement of a patent, and that in case of a settlement before or after such litigation plaintiffs were to be paid, over and above such agreed basis for charges, an additional amount equal to twenty per cent. of any sum paid by way of settlement, as compensation for obtaining such settlement; and a finding by the jury to the contrary was properly changed by the trial court.

APPEAL from a judgment of the circuit court for Milwaukee county: GEORGE CLEMENTSON, Judge. *Affirmed.*

Prior to January, 1911, the plaintiffs, copartners and attorneys at law in Chicago, Illinois, principally engaged in patent litigation, had been employed by defendant *Maurice H. Glauber* and his brother, Joseph H. Glauber, now deceased, the two being then and thereafter copartners under the firm name of Glauber Brass Manufacturing Company, at Cleveland, Ohio, to conduct litigation against a firm in Illinois which it was claimed was infringing on the rights secured by letters patent issued to J. H. Glauber on water faucets and held by him for the benefit of the partnership. After such litigation had been terminated favorably to the Glaubers, correspondence was had between plaintiff *Addington* on behalf of his coplaintiffs and the Glauber Brass Manufacturing Company by Joseph H. Glauber, the material parts of which correspondence follow:

"January 2, 1911.

"Jones, Addington, Ames & Seibold, . . . Gentlemen: Attention *Mr. Addington.* In order that we may come to an early conclusion regarding some procedure against the Hoffmann & Billings Mfg. Co. we will thank you to submit to us your proposition on the contingent-fee basis as discussed

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with the writer and our *Mr. M. H. Glauber* while in Chicago recently.

"We would like to have you write us clearly, explaining in full your proposition so as to avoid any possibility of misunderstanding, and so that we may clearly understand each other, that we will not be obliged to proceed with suit in court, unless we see some good chance of a good recovery, nor accept any settlement that they may offer us, unless it be an acceptable one to us. . . ."

"Chicago, January 7, 1911.

". . . Gentlemen: Replying to yours of the 2d inst. . . . Now, in regard to the terms of handling the Hoffmann & Billings negotiation. The writer will conduct the negotiations for a settlement with Hoffmann & Billings upon a basis of twenty per cent. of the amount obtained. . . . If the negotiations prior to suit fail and a suit becomes necessary, all services shall be paid for at the existing scale of charges. If subsequently to the suit a settlement is reached, then our percentage is to be applied in addition to the charge for services rendered in the suit. But even though the suit is started no charge is to be made by the writer for services in negotiations for a settlement; nor is a charge to be made at any time for services in closing a settlement out of which we are to receive a percentage in consideration of our services. . . .

"If the above is not entirely clear, write us and we will endeavor to make it so. . . ."

"Cleveland, 1—17—11.

"Attention *Mr. Addington.* Dear Sir: Answering yours of the 7th inst., wish to say that we do not fully understand your proposition concerning charges. (a) . . .; (b) . . .; (c) you say, 'if the negotiations prior to suit fail and a suit becomes necessary, all services shall be paid for at the existing scale of charges.' It appears to us that this would remove the entire percentage plan between us. Does this mean that all work done towards bringing about a settlement would have to be paid for at the present existing scale of charges if no settlement is concluded without suit? (d) 'If subsequently to the suit a settlement is reached, then our percentage is to be applied in addition to the charges for services rendered in the suit.' According to this and paragraph (c) you would be charging us the existing scale of

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charges for all work prior to suit, also for all services rendered in the suit and the percentage in addition for negotiating the settlement. We hardly think you mean it in this way. (e) 'But even though the suit is started, no charge is to be made by the writer for services in negotiations for a settlement; nor is a charge to be made at any time for services in closing a settlement out of which we are to receive a percentage in consideration of our services.' This, we take, means that for the negotiations for which you receive a percentage you are not to receive in addition thereto your regular scale of charges. (f) . . . (g) 'The point mainly sought to be guarded against by the writer is not to place you in a position to call upon any other member of the firm to conduct these negotiations upon the percentage basis.' We take this to mean that only services in connection with the suit would not be included in the percentage basis. If there are other services you have in mind we would thank you to advise more definitely.

"Our impression was that the twenty per cent. arrangement was to cover our expenses or cost in full for all your services (including any and all additional services you may require), excepting in the event suit became absolutely necessary, in which event only the services directly incidental to the suit should be paid for at the existing scale of charges. That the twenty per cent. charge applied if no suit was necessary, or in full for all services and expense (except that directly incidental to suit) prior to and after suit. Our impression was that the percentage included reporter's services or your own stenographer's services, traveling expense, and all other expenses necessary to conclude the settlement without suit. . . .

"We have written at length and assure you that our intentions are only to avoid misunderstandings. It appears, however, that there are so many angles to this situation that we cannot foresee, therefore, if there is any way of your simplifying the proposition we would be pleased to have you do so, or have you straighten us out on the proposition you have submitted. . . ."

"Chicago, January 28, 1911.

"Glauber Brass Mfg. Co. . . . Gentlemen: In replying to yours of the 17th instant, we will follow the lettered subdivisions that you have adopted.

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"(a) . . . (b) . . .

"(c) If negotiations fail and suit is required, no compensation would be required of you with respect to the services rendered unless ultimately a settlement was obtained, in which event the percentage arrangement would apply. In short, compensation for the negotiation services would be held in abeyance and might never produce anything to us.

"(d) For each class of service you are to pay but once. For negotiation service, never upon any other basis than a percentage basis. For litigation services, only as per the existing scale of charges.

"(e) The meaning of this is that not only are the negotiation services included in the percentage charge, but also the services required in closing up the settlement, such as the drawing up of the contract, etc.

"(f) Your understanding is correct.

"(g) I have nothing further in my mind, or, for that matter, up my sleeve.

"If I should have to do any traveling, you are to pay the traveling expenses, including hotel bills, etc. Any clerical service in our office you are not to be charged for so long as the percentage basis prevails. The commencement of suit upon negotiations failing is optional with you. . . . So far as the acceptance of any settlement is concerned, that is for you to decide. If you saw fit to reject what we might obtain, we could have no complaint. We would have to take our chance upon the negotiation of an acceptable proposition.

"I believe this letter, taken in connection with yours and with ours to which yours was a reply, puts this matter in as simple a form as it may well be put without further trouble on our respective parts. . . ."

"Cleveland, 1—30—11.

". . . Attention *Mr. Addington.* Dear Sir: After reading your explanations in letter of the 28th inst., it seems that we have a clearer understanding between us concerning the contingent fee. We also know that your treatment towards us will be fair and equitable, and that you will be willing to adjust any differences that may arise between us just as you have in the past, and therefore we suggest that you start to negotiate with the H. & B. Mfg. Company for settlement. . . .

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"We believe you understand that we also intend to be fair with you, and we will both have to rely upon each other in this respect. . . ."

"Chicago, February 2, 1911.

"Glauber Brass Mfg. Co., Cleveland, Ohio. Gentlemen: Yours of the 30th ultimo is before us. The arrangements made are satisfactory to us and we are ready to proceed. . . ."

"Cleveland, 2—4—11.

"Messrs. Jones, Addington, Ames & Seibold. Hoffmann & Billings. Gentlemen: Contents of your letter of Feb. 2, '11, noted. . . . Jos. H. Glauber."

Thereafter efforts were made for a settlement with the Hoffmann-Billings Company, which failing, a suit was started in the name of J. H. Glauber in the district court for the Eastern district of Wisconsin in February, 1912. During the pendency thereof Mr. J. H. Glauber died, November 27, 1914; proceedings were had to probate his estate at Cleveland, Ohio, and the defendant *Citizens' Savings & Trust Company* was appointed executor, and the business of the partnership was continued as before by such executor and the defendant *Maurice H. Glauber.*

The federal court on March 29, 1915, entered an interlocutory decree affirming the validity of the patent in question, and thereafter proceedings were had to obtain an accounting for the profits made by the defendant and damages sustained by the plaintiff, which required a considerable amount of legal and accounting services. During such accounting various statements were required from and presented by the Hoffmann-Billings Company from their books of the profits from the sales of the patented device, the several statements increasing in amounts and the last one showing on its face about $30,000.

In the fall of 1916 negotiations were renewed for a settlement, and in October an offer of $5,000 was made by the Hoffmann-Billings Company, which was raised by them to $17,500 on December 7th. On receipt of such offer the

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Glauber Company telegraphed to the plaintiffs stating the amount so offered and asking for an immediate answer as to about how much would be due plaintiffs in addition to their statement rendered on November 1st, which showed a balance due of $2,457. This was immediately answered by plaintiffs, stating that the balance shown on November 1st was increased by an additional sum, making it $2,799.76, and that "in addition to this our contract with you calls for twenty per cent. of the amount for which the case is settled after court costs have been deducted should you have to pay for them. The agreement is contained in the correspondence which passed between us in the months of January and February, 1911."

On December 10th the defendant *M. H. Glauber* and Mrs. J. H. Glauber telegraphed Hoffmann-Billings Company that the plaintiffs claimed a twenty per cent. slice, gross, of any amount paid in settlement and that this is in addition to the bills they have rendered; that this added to the bills and other expenses they had already paid out in the case, amounting to fully $10,000, would leave hardly anything for them if settled at the figure named; and that under these circumstances they cannot now see their way clear to accept anything less than $20,000 in full settlement.

This was accepted by the Hoffmann-Billings Company and a formal settlement at that amount was executed on December 18th providing for the payment of $2,500 on the execution of the agreement and the balance in monthly payments.

Statements were rendered by and payments made to plaintiffs from time to time on account of services and disbursements in the litigation itself, both before and after the death of J. H. Glauber. In the final settlement all but about $100 thereof was for services or disbursements subsequent to his death and therefore for services rendered while the business was being conducted by the executors of the estate and *Mr. Maurice H. Glauber.*

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Thereafter the plaintiffs commenced suit against the defendants herein for the balance claimed to be due on the account for services and disbursements in the litigation, amounting to $3,000, with interest from various dates, together with the additional sum of $4,000 as a twenty per cent. commission upon the amount of $20,000 received and accepted by the Glaubers in settlement. A garnishment proceeding was instituted at the same time against the Hoffmann-Billings Company, and thereupon the defendants appeared in this action and by answer admitted that the plaintiffs, upon directions from the Glauber Brass Manufacturing Company, had brought the suit for the infringement referred to, and that though it was brought in the name of Joseph H. Glauber it was in fact brought for and on behalf of the copartnership, and at all times constituted and was treated as an asset of said copartnership.

They further admitted the probate proceedings upon the death of J. H. Glauber, the decision adjudging the validity of the claim under the patent and the making of the agreement of settlement of December 18, 1916, and then entered a general denial as to all the other matters in the complaint.

At the time of the trial and after substitution of attorneys on behalf of the defendants, an amended answer pleading the payment was filed and a counterclaim interposed admitting the employment by Joseph H. Glauber, deceased, and *Maurice H. Glauber* of the plaintiffs to render services in connection with the said litigation; that the services rendered by the plaintiffs from the time of such retainer up to the present time were reasonably worth not in excess of $3,000; that it had been agreed by the parties that in no event would the charge for the services rendered by the plaintiffs for the defendants exceed twenty per cent. of the total amount recovered, and that in reliance upon such agreement payments had been made on account from time to time. That there had been overpayment in excess of the reasonable value of said services and in excess of the twenty

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per cent. of the settlement and which excess would approximate $8,000, and that there was due to the defendants from the plaintiffs the difference between the amount paid by defendants and the reasonable value of said services, amounting to $4,118.50, for which sum they demanded judgment.

Upon the trial and after motions for a directed verdict had been made by each party a special verdict was submitted the substance of which was as follows: (1) Was a contract entered into in 1911 between the Glauber Brass Manufacturing Company and the plaintiffs by which plaintiffs were employed to conduct the patent litigation in question? Answered "Yes" by the court. (2) Was it the agreement that in the event suit should be brought that the plaintiffs should be paid their regular fees for such services and in addition to such fee to receive a further sum of twenty per cent. of the amount for which the claim should be settled? Answered "No" by the jury; changed by the court to "Yes." (3) Were the regular established fees and charges for services and time which the plaintiffs charged to the defendants in that suit known to the Glauber Company at the time of the retainer in 1911? Answered by the jury "Yes." (4) Was it the agreement that for the entire services of the plaintiffs in the case mentioned the plaintiffs should receive no more than twenty per cent. of the amount recovered whether the recovery was by judgment or settlement? Answered by the jury "No."

Upon motion subsequent to the verdict the court changed the answer to the second question as above indicated from "No" to "Yes," and thereupon directed judgment in favor of the plaintiffs for the principal sum of $7,000, being the balance of $3,000 and the commission of $4,000, together with interest, costs, and disbursements; and from the judgment so entered defendants have appealed.

For the appellants there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *A. W. Richter,* of counsel, all of Milwaukee, and oral argument by *Mr. Richter.*

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For the respondents there was a brief by *Austin, Fehr & Gehrz* of Milwaukee, and oral argument by *Gustave G. Gehrz.*

ESCHWEILER, J. The appealing defendants in this action contend substantially as follows:

(1) The court below should not have entertained jurisdiction of this action because, it being upon a contract sought to be enforced after the death of one of the parties thereto, Joseph H. Glauber, the remedy, so far as his estate was concerned, must be confined to the filing of a claim in the probate proceedings in Cleveland.

(2) That, being in the nature of a claim against the estate of Joseph H. Glauber and the defendant *Maurice H. Glauber,* it was such a joint liability that, the court below having under the first objection no jurisdiction as to the estate of the deceased partner, it had no jurisdiction as to the other defendant upon such joint obligation.

(3) That the letters purporting to show the contract and written by the deceased J. H. Glauber were inadmissible under sec. 4069, Stats., because such constituted a transaction with a deceased person.

(4) That the widow of the deceased, who testified on behalf of plaintiffs to the signature of the deceased J. H. Glauber to those letters, was an incompetent witness thereto.

(5) That under the evidence the answer of the jury to the second question of the special verdict should have been sustained.

Such authorities as *Wisdom v. Wisdom,* 155 Wis. 434, 437, 145 N. W. 126; *Lehman v. Weiner,* 167 Wis. 428, 167 N. W. 806, and many others in those cases cited holding that claims against a deceased person should be presented to the court administering his estate, all recognize the further rule that when the remedy in that court is not complete and full the concurrent jurisdiction of the circuit court may be invoked. *Meyer v. Garthwaite,* 92 Wis. 571, 573, 66 N.

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W. 704; *Mangan v. Shea,* 158 Wis. 619, 625, 149 N. W. 378; *Eisentraut v. Cornelius,* 134 Wis. 532, 537, 115 N. W. 142; *Lindemann v. Rusk,* 125 Wis. 210, 226, 104 N. W. 119; *Burnham v. Norton,* 100 Wis. 8, 12, 75 N. W. 304.

The situation here warranted an appeal to the circuit court rather than to either a county court in Ohio or one in this state having ancillary jurisdiction. Here it was desired to impound by garnishment the fund that was owing from the Wisconsin corporation, Hoffmann-Billings Company. It was desired to proceed against the estate of the deceased, J. H. Glauber, the surviving partner, *M. H. Glauber,* and the Glauber Brass Manufacturing Company as continued after the death of J. H. Glauber.

Furthermore, any objection that some other court had primary jurisdiction was completely waived by all these defendants appearing generally in this action and raising no such objection by special plea or in their answers. They also all joined in a counterclaim based upon the alleged retainer of the plaintiffs during the lifetime of J. H. Glauber by the Glauber Brass Manufacturing Company. When they thus voluntarily use the jurisdiction of a court for the purpose of seeking to have it award them an asset, they ought not to be heard in successful lament when it gives them a liability.

This disposition of the question of jurisdiction renders it unnecessary to consider the second alleged error.

The letters between the parties, as appearing in the statement of facts, constituted the contract between them as much as though what is therein said was finally embodied in one writing signed by both. Such a written contract is not the "transaction or communication" referred to in sec. 4069, Stats., relied upon by appellants in their third assignment of error. The writings are the best evidence of the contract and they speak for themselves and needed and permitted no oral evidence from the writers thereof to establish them as the contract. The lips of J. H. Glauber, if

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living, would have been just as much sealed, if called as a witness to testify either in confirmation or impeachment of the contract as expressed in the documents, as they were sealed by death at the time of the trial. There was nothing, therefore, offered which was subject to contradiction by J. H. Glauber were he living. The situation presented was neither within the letter nor spirit of the excluding statute in question.

The fourth objection was not well taken. The widow of J. H. Glauber might properly identify the signature of her husband. It in no sense involved any question as to the terms of the contract or as to the facts surrounding the writing of the particular letters. It also was not such "transaction or communication" as is within the purview of sec. 4069, Stats., *supra*. *Daniels v. Foster,* 26 Wis. 686, 693; *Beem v. Kimberly,* 72 Wis. 343, 363, 39 N. W. 542.

Under sec. 4192, Stats., these letters would themselves have been presumptive evidence that they had been signed by the person whose signature appeared thereon, except that such presumption does not extend to a document purporting to have been signed by some one deceased at the time of the trial.

The admissions in the answer of a retainer, the assertion that there was an employment which was relied upon by defendants as the basis for their counterclaim, the letters written by plaintiffs and produced by defendants upon notice, and the cross-references by dates and subject matter in those letters and the letters purporting to have been signed by J. H. Glauber, together with other evidence in the case, make it clear beyond peradventure that these letters were what they purported to be and the evidence of the widow more formal than substantial.

On the fifth and last point urged by appellants we are satisfied from an inspection of the letters of January and February, 1911, set forth in the statement of facts, that there was a distinct proposal by plaintiffs, understood and

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accepted by defendants, that there was to be paid a regular scale of prices for services in the litigation, and in case of a settlement before or after the suggested litigation there was then to be paid, over and above such agreed basis for charges, an additional sum equal to twenty per cent. of any sum paid by way of settlement, as a compensation for obtaining such a settlement. The parties so agreed and must be bound thereby. Furthermore, the defendants made efficient use of such claim by obtaining on account thereof an increase of $2,500 from the Hoffmann-Billings Company in the final settlement.

Both parties having moved for a directed verdict, the court might well have, under sec. 2857*a*, Stats., ordered judgment for plaintiff without submitting to the jury the questions which it did. There was no error in the court's changing the answer of the jury to the second question and finding as a matter of law that the contract was as contended by plaintiffs, and particularly so when the jury, upon the evidence, by their answer to the fourth question had determined that the contrary view asserted by the defendants was not the correct one. The court was clearly right in directing judgment for the plaintiffs as it did.

By the Court.—Judgment affirmed.

KERWIN and ROSENBERRY, JJ., took no part.

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7. A former decision in this court that the plaintiff company's contract with a city for municipal lighting was valid and that a similar contract between the city and the defendant company was invalid, did not involve questions as to the city's right to breach plaintiff's contract or as to plaintiff's right to enforce specific performance; and neither of those matters is *res judicata. Oconto E. Co. v. Oconto S. Co.* 165

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ATTORNEY GENERAL.

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3. Sec. 3236, Stats., relating to actions by the attorney general to restrain corporations or individuals from exercising corporate rights which have never been granted, is not applicable to an action involving only the question as to which city official should exercise a power (in this case the power to canvass the returns of an election in the city) which has been granted. *State ex rel. Haven v. Sayle,* 159

4. Such an action can be brought by the attorney general in the circuit court only on request of the governor or of one branch of the legislature. *Ibid.*

5. Such an action, though *publici juris,* is of purely local concern and the remedy in the lower courts is ample; hence it is not within the original jurisdiction of the supreme court as that jurisdiction has been defined. *Ibid.*

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1. Auction sales are subject to the conditions announced by the auctioneer at the opening of the sale, which bind all bidders whether they actually heard them or not. *Keske v. Boeder,* 369

Same: Reservation of right of resale: Mutual mistake.

2. Where at the opening of a public sale the auctioneer announced that in case he made a mistake he reserved the right to resell the property, it was not necessary, in order to prevent a sale from being absolute, that there should have been a mutual mistake. *Keske v. Boeder,* 369

3. A declaration by the auctioneer, in such case, that he had made a mistake in the sale of a horse was not conclusive upon the parties, but the fact should be determined upon a consideration of all the circumstances. *Ibid.*

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Completion of sale.

4. Sub. (2), sec. 1684*t*—21, Stats., providing that "a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner," does not conflict with the rule above stated. *Keske v. Boeder,* 369

AUTOMOBILES.

Law of the road: Violation: Negligence. See HIGHWAYS, 4.

1. In an action to recover damages for death of plaintiff's husband in a collision, evidence that the deceased, riding upon a motorcycle on the proper side of the street, approached a street intersection from the west at an ordinary and proper rate of speed, that defendant's truck, coming from the north on the cross street, shot suddenly out from behind a building at a high rate of speed, and that the driver of the truck did not keep a proper lookout, did not have proper control of his machine, and apparently was unmindful of his duty to give the deceased the right of way, was sufficient to sustain a finding by the jury acquitting the deceased of contributory negligence even if the fact was that the motorcycle ran into the truck. *Glatz v. Kroeger Bros. Co.* 635

2. The physical facts as to the marks upon the truck and the motorcycle and the relative positions of the two vehicles and the body of the deceased after the collision did not conclusively show which vehicle ran into the other, and did not, in any view thereof, justify the trial court in changing the jury's finding as to contributory negligence. *Ibid.*

Same: Violation of municipal ordinance.

3. One who, in violation of sec. 1636—52, Stats., drove an automobile at night, with only dim sidelights thereon, on the streets of a city, too fast to enable him to stop the car within the distance ahead that he could see an object the size of a person, was guilty of negligence with respect to a collision with the rear end of plaintiff's milk wagon, even though, after discovering the presence of the wagon a few feet in front of him, he could not by the exercise of ordinary care have avoided striking it. *Yahnke v. Lange,* 512

Same: Contributory negligence. See RAILROADS, 2. WORKMEN'S COMPENSATION, 3.

4. Where at the time of such collision plaintiff's wagon did not have attached to it a lighted "lamp or lamps . . . so displayed as to be visible from the rear and front of such vehicle," as required by an ordinance of the city, plaintiff also was guilty of negligence which, if it contributed to the injury, precludes a recovery by him therefor. *Yahnke v. Lange,* 512

5. A lantern hung on the left side of the box-like superstructure of the milk wagon did not constitute a compliance with the ordinance, because not visible to one coming from the rear if he was somewhat to the right of the wagon; nor did another lantern on the floor of the wagon in front of the driver's seat and otherwise obscured, constitute a compliance. *Ibid.*

6. A finding by the Milwaukee civil court that the absence of proper lights on the milk wagon proximately contributed to the accident is *held* not to be against a clear preponderance of the evidence. *Ibid.*

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BAILMENTS.

Deposits for safekeeping: Offset of same against debts.

In an action to recover moneys which plaintiff had deposited with defendant not as payments on a truck but for safekeeping only, it being found that the amount thereof was due to defendant on the purchase price of the truck, it was proper for the trial court so to apply it and end the controversy. *Albright v. Stegeman M. C. Co.* 557

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Preferences and transfers by bankrupt.

1. Although, pursuant to an arrangement with a grain company and with the consent of its successor (which had assumed the liability), defendant applied certain credits in part payment of a loan, and within four months thereafter such successor was adjudged a bankrupt, and even if the evidence tended to show insolvency of such successor at the time such application of credits was made, yet there was no evidence warranting submission to the jury of the question whether that application constituted either a fraudulent transfer or an unlawful preference under the bankruptcy act—the transaction having been, so far as the evidence shows, an ordinary business transaction between two going concerns, both acting in good faith and both believing themselves to be solvent. *Brittan v. Buerger C. Co.* 590

Action by trustee to recover assets unlawfully diverted. See BILLS AND NOTES, 2. CONTRACTS, 16. CORPORATIONS, 5.

2. The right which a corporation has to recover its assets which have been unlawfully diverted passes to its trustee in bankruptcy and he may maintain an action for such recovery when necessary to liquidate claims of creditors of the corporation. *Miley v. Heaney,* 58

BANKS AND BANKING. See GARNISHMENT, 1.

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BILL OF LADING. See CARRIERS, 1.

BILLS AND NOTES.

Execution: Corporation as accommodation maker. See CORPORATIONS, 3, 5.

1. A finding by the trial court that a note to a bank, executed by a corporation and indorsed by one M., who was its president and principal stockholder, the proceeds of which note were credited by the bank to the corporation and for the amount of which the corporation then gave its check to M., was in fact given by the corporation for the accommodation of M. and that he did not thereby become the debtor of the corporation, but that the corporation merely became his surety to the bank, is *held* to be sustained by the evidence. *Miley v. Heaney,* 58

Same: Right of accommodation maker to recover payments made for maker.

2. The corporation, accommodation maker of said note, having thereafter paid to the bank certain sums of interest on the note for the benefit of M., and after bankruptcy of the corporation certain dividends from its assets having been paid to the bank upon the note, the trustee in bankruptcy was entitled to recover from M. the amount so paid, with interest, but was not entitled to recover from him the whole amount of the note. *Miley v. Heaney,* 58

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Wife as undisclosed principal on note of husband. See HUSBAND AND WIFE.

3. Under sec. 1675—18, Stats., where a promissory note was signed only by a husband in his own name, an indorser who was compelled to pay the note cannot hold the wife of such maker liable as a principal thereon. *Frailing v. Sieber,* 259

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Although the bond of the surety provided that in any action thereon the contractor should be made a party, it was a sufficient compliance therewith to make the contractor's trustee in bankruptcy a party, no objection to such procedure having been made either by answer or demurrer. *School District v. Blystone,* 471

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Lawful bridge: Repairs: Statutory requirements as to strength.

In sec. 1322*m*, Stats. 1917, the words "no such bridge or culvert" refer to the kind of bridge or culvert theretofore mentioned in the section; hence, every "iron, steel or concrete bridge or culvert of more than four feet in length of span" must, when repairs are made thereon, be left strong enough to sustain a load of fifteen tons. *Holdgrafer v. Benton,* 187

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Employment under contract of exclusive sale.

Where no consideration was paid by a real-estate broker for a contract giving him for a certain time the "exclusive sale" of a farm, and he incurred no obligation to do anything, such contract, while it precluded the owner from giving any one else the power to sell, did not preclude a sale by the owner himself, during the period named, in the absence of clear and unequivocal language negativing such right on his part. *Roberts v. Harrington,* 217

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Nature of action: Relief from unilateral mistake: Fraud.

1. An application for cancellation of a contract is addressed to the sound discretion of a court of equity; and substantial mistake on the part of the party applying may be sufficient ground for relief, even though there was no intentional fraud. *Stimpson v. Stimpson,* 146

Same: Wills: Agreement to withdraw objection to probate.

2. By an agreement between the legatees named in a will and the widow (for whom no provision was made), her objections to the probate of the will were to be withdrawn, she was to receive a large part of the estate, and the remainder was to be distributed

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among the legatees. This agreement was signed by the legatees under a mistake, both as to the size of the estate and their rights therein, resulting from affirmative misstatements made without intentional fraud by one who, with the approval of the widow's attorneys, had undertaken to procure such signatures. *Held*, that in the absence of ratification or estoppel such agreement might properly be canceled in a suit by the legatees. *Stimpson v. Stimpson*, 146

[3. Whether, no trusts being displaced and the parties with one exception being *sui juris*, said agreement was wholly void as against public policy, is not decided.] *Ibid.*

Proceeding and relief: Return of consideration to mortgagee.

4. Upon canceling, as void under sec. 1770*b*, Stats., conveyances of real property in Wisconsin to a foreign corporation which afterwards, through another person, mortgaged its interest in the premises to a bank, the consideration received by the Wisconsin owner for the property is *held*, in equity and good conscience, to belong to the bank. *Wisconsin Trust Co. v. Munday*, 31

Same: Cancellation of void contract. See CORPORATIONS, 21.

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CARRIERS.

Contract of carriage prescribed by statute: Published rates.

1. Under the Carmack amendment (of June 29, 1906) to the interstate commerce act (34 U. S. Stats. at Large, ch. 3591, p. 595), the carrier receiving property for interstate transportation was required to "issue a receipt or bill of lading therefor," and this constituted the contract between the shipper and all the carriers participating in the service. *Bassett v. C. & N. W. R. Co.* 617

2. The published rates prescribed by said act, based upon valuation, were presumed to be equally within the knowledge of carrier and shipper, and both were bound by them as a matter of law. *Ibid.*

Same: Responsibility of initial carrier: Connecting carrier.

3. While the receiving carrier was responsible, under said statute, for the whole carriage, each participating carrier might be sued for loss or damage occurring on its own line, and the liability of the carrier sued was fixed by the applicable valid terms of the original bill of lading. *Bassett v. Chicago & N. W. R. Co.* 617

Same: Burden of proof: Concurring negligence: Joint tortfeasors.

4. In an action under the federal statute against the initial carrier for damage to goods in transit, the defendant is liable for all intermediate carriers until the goods are received at their destination, including, in this case, a bonded cartage company which delivered the goods to the customs warehouse at their destination. *Vogel v. Delaware, L. & W. R. Co.* 567

5. When in such an action it is shown that the goods have not been delivered to the consignee the presumption arises that they have been lost through negligence of the initial carrier or its agents, and the burden of proof is upon such carrier to show that the loss resulted from some cause for which it is not responsible. *Ibid.*

6. In an action under the federal statute against the initial carrier for damage in transit to goods described in the bill of lading as being in apparent good order, the evidence is *held* sufficient to show delivery of the goods to defendant at New York in good condition and that they arrived in Milwaukee in bad condition. *Ibid.*

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Same: Agreed valuation: Limitation of recovery. See COURTS, 4.

7. Under the Carmack amendment, where the parties to an interstate shipment agreed upon a valuation of the property, for the purpose of determining the rates to be charged, or where the shipper paid an alternative rate based upon a certain valuation, such valuation limited the amount which he might recover for loss or damage due to defaults of the carriers; and it was immaterial whether such loss or damage was caused by ordinary negligence or by gross negligence as defined in the law of this state. *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, so far as it conflicts herewith, overruled. *Bassett v. Chicago & N. W. R. Co.* 617

8. Where damage to property in the course of interstate transportation was caused by concurring negligence of the delivery carrier and of a preceding connecting carrier, they were joint tortfeasors and each was responsible for the entire result, the shipper's recovery, however, not to exceed the amount limited as above stated. *Ibid.*

Liability of consignor for charges: Not altered by custom: Waiver of lien.

9. Upon an interstate shipment of merchandise the consignor is primarily liable for the freight charges, although the bill of lading provides that "the owner or consignee shall pay [such charges] and, if required, shall pay the same before delivery;" and failure of the carrier to collect the charges from the consignee, even though the lien therefor on the goods is thereby lost, is no defense against such liability of the consignor. *Chicago, I. & L. R. Co. v. Peterson,* 193

10. No alleged custom or usage as to a certain commodity, that the carrier should, before delivery thereof, collect the freight charges from the person presenting the bill of lading at the point of destination, can be shown to alter the relations between shipper and carrier under the laws and rules regulating interstate commerce, or to create a preference in favor of the shippers of that particular commodity. *Ibid.*

CASUAL EMPLOYMENT. See WORKMEN'S COMPENSATION, 4.

CERTIORARI.

Motion to supersede: Appeal.

A motion to supersede a writ of *certiorari* is in fact a demurrer, and the order thereon is subject to the same right of appeal that applies to decisions on demurrers. *State ex rel. South Range v. Tax Comm.* 253

CHARTER. See ELECTIONS, 3.

CHEAT. See FALSE PRETENSES, 7.

CIRCUIT COURTS. See COURTS, 5, 6.

CITIES. See MUNICIPAL CORPORATIONS.

CITY CHARTER. See MUNICIPAL CORPORATIONS, 3.

CITY COUNCIL. See MUNICIPAL CORPORATIONS, 4.

CIVIL COURT. See COURTS, 11, 12.

CIVIL PROCESS. See CONSTITUTIONAL LAW, 4.

CLAIMS AGAINST DECEDENTS. See EXECUTORS, 1.

CLASSIFICATION. See CONSTITUTIONAL LAW, 10, 12.

CLERK OF COURT. See OFFICERS, 1.

CLOUD ON TITLE. See VENDOR AND PURCHASER, 4.

COLLATERAL. See CORPORATIONS, 1.

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COLLATERAL ATTACK. See INSURANCE, 2.
COMBINATIONS. See MONOPOLIES.
COMMERCE. See CARRIERS, 10. CORPORATIONS, 17. MONOPOLIES, 1.
COMPENSATION for injuries. See WORKMEN'S COMPENSATION.
CONCLUSION OF LAW. See APPEAL, 8.
CONCURRING NEGLIGENCE. See CARRIERS, 8.
CONDEMNATION. See TELEGRAPHS AND TELEPHONES, 2.
CONDITION PRECEDENT. See CONTRACTS, 16.
CONDITIONAL SALE. See SALES, 4.
CONFIDENCE GAME. See FALSE PRETENSES, 6.
CONFLICT OF LAWS. See EXECUTORS, 2. STATES.
CONGRESS. See CONSTITUTIONAL LAW, 4. STATES.
CONJECTURAL VERDICT. See TRIAL, 2.
CONNECTING CARRIER. See CARRIERS, 3, 8.
CONSIDERATION. See VENDOR AND PURCHASER, 2.
CONSOLIDATION OF ACTIONS. See ACTION.
CONSPIRACY. See MONOPOLIES.

CONSTITUTIONAL LAW.

See COURT COMMISSIONERS, 3. STATES.

Construction of constitutional provision: Practical construction.

1. Where the language of a constitutional provision is clear and unambiguous, no room is left for practical construction. *State ex rel. Haselton v. Turner,* 170

Classification by legislature: Discretion.

2. As to matters of classification the legislature has a very broad discretion and its judgment with reference thereto will be respected and enforced by the courts unless the classification is so arbitrary that there is no conceivable basis in reason therefor. *Price v. State,* 603

Delegation of legislative power.

3. Under the provision in sub. 10 of sec. 1770*b*, Stats., to the effect that every contract made by a foreign corporation in violation of that section, when affecting its personal liability or relating to property within this state, "shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them," the contract does not become void or not at the election of the other party, but, so far as it is a contract in favor of or on behalf of the offending corporation, is expressly made void by the terms of the statute; and the statute is therefore not unconstitutional on the ground that it delegates to a private individual the legislative power to impose or not, at his election, a penalty for the doing of the prohibited act. *Duluth M. Co. v. Clancy,* 139 Wis. 189, 194; *Hanna v. Kelsey R. Co.* 145 Wis. 276; and *Lanz-Owen & Co. v. Garage E. M. Co.* 151 Wis. 555, explained. *Wisconsin Trust Co. v. Munday,* 31

War power: Granting exemption from civil process.

4. Ch. 409, Laws 1917 (sec. 4232*a*, Stats. 1917), granting to persons in the military service of the United States or of this state exemption from civil process and the right to a stay of proceedings in civil cases pending against them, is not an exercise of the war power exclusively vested in Congress by sec. 8, art. I, Const. of U. S. *Konkel v. State,* 335

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5. Thus in a bastardy proceeding against a person in the military service of the United States, the provisions of the federal soldiers' and sailors' civil relief act (40 U. S. Stats. at Large, ch. 20), prescribing the conditions under which the delinquent father may be proceeded against, must govern, as against the more liberal immunity or exemption granted by sec. 4232*a*, Wis. Stats. 1917. *Ibid.*

Privileges and immunities: Statute not limited to residents.

6. Nor does said statute conflict with amendm. XIV or with sec. 2, art. IV, Const. of U. S. The privileges and immunities of the act not being denied to citizens of other states by the express terms of the act, it applies to all such citizens. *Konkel v. State,* 335

7. As construed by this court secs. 1770*b* and 1770*j*, Stats., are valid. They do not infringe upon any rights, privileges, or immunities granted by the federal or state constitution, do not impair the obligation of contracts, and do not contravene any provision in either of said constitutions. *Wisconsin Trust Co. v. Munday,* 31

Police power: Regulation of practice of optometry: Ex post facto law.

8. The practice of optometry has a real and direct bearing upon the public health and calls for special skill and knowledge; and sec. 1435*f*—35, Stats. 1917, regulating such practice and limiting it to persons duly licensed as therein prescribed, is a valid exercise of the police power. *Price v. State,* 603

9. The fact that said statute prevents many who were engaged in the practice of optometry at the time of its enactment from continuing therein does not render it void as an *ex post facto* law; nor is the statute invalid on the ground that it deprives any person of property without due process of law. *Ibid.*

10. Said statute is not invalid because it permits persons to select their own glasses although harm may result from such selection. An attempt of the legislature to suppress or minimize an evil is not to be condemned because it does not entirely eradicate it. *Ibid.*

Same: Persons exempted: Discrimination against residents.

11. Said statute is not rendered invalid by the fact that physicians and surgeons, and persons who sell spectacles without attempting to test the eyes, are exempted from its provisions. *Price v. State,* 603

12. The provision in said law that the board of examiners may permit to practice optometry in this state any person who has been admitted to such practice in another state, upon production of a certificate showing that he has passed an examination in such other state and has actually practiced optometry therein for a term of two years, does not improperly discriminate against residents of this state or render the law invalid. *Ibid.*

Same: Regulation of trading stamps or coupons. See TRADING STAMPS.

Same: Regulation of contract between municipal corporation and railway company.

13. Ch. 122, Laws 1891, authorizing a city to construct a viaduct and to contract with a railway company for payment by the latter of a part of the cost and for vacation of a part of a city street, did not violate sec. 31, art. IV, Const., as it then stood, and was a valid exercise of the police power to supervise and control thoroughfares in the interest of public safety and convenience. *Milwaukee v. Chicago, M. & St. P. R. Co.* 534

14. The contract so authorized between the city and the railway company remains subject to legislative control, and the right to exercise the police power of the state on the subject is not bargained away. *Ibid.*

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CONSTRUCTIVE DENIAL. See NEW TRIAL, 1, 2.
CONSTRUCTIVE REFUSAL. See HIGHWAYS, 2.
CONSULAR INVOICE. See EVIDENCE, 3.

CONTRACTS.

Validity. See CONSTITUTIONAL LAW, 3. CORPORATIONS, 3, 16. DIVORCE, 1. DRAINS, 1–3. FRAUDS, STATUTE OF. MONOPOLIES, 4, 6. WORKMEN'S COMPENSATION, 9.

When made: Acceptance without signature.

1. Parties may become bound by the terms of a written contract even though they do not sign it, where their intention to become bound is otherwise indicated. *Albright v. Stegeman M. C. Co.* 557

Same: Waiver of signature.

2. In a written order by plaintiff for a motor truck, to be manufactured by defendant company, a provision that in order to constitute a valid contract the order must be countersigned by an officer of defendant was waived, and the acceptance of the order sufficiently shown, by defendant's retention of a down payment and by the facts that defendant started work on the truck to the knowledge of plaintiff, who himself worked on it as an employee in defendant's factory, that delay in its completion was the subject of frequent complaint and discussion, and that the plaintiff took the truck out on trial trips. *Consolidated W. P. Co. v. Nash,* 109 Wis. 490, distinguished. *Ibid.*

3. The defendant in such case, having become bound by the contract, acquired the right to enforce it against the plaintiff. *Ibid.*

Meeting of minds: Contract made by letters.

4. Letters which passed between plaintiffs, who are attorneys at law, and a partnership since dissolved by death of one member, are *held* to show a distinct proposal by plaintiffs, understood and accepted by the partnership, that plaintiffs should be paid a regular scale of prices for services in certain proposed litigation involving infringement of a patent, and that in case of a settlement before or after such litigation plaintiffs were to be paid, over and above such agreed basis for charges, an additional amount equal to twenty per cent. of any sum paid by way of settlement, as compensation for obtaining such settlement; and a finding by the jury to the contrary was properly changed by the trial court. *Jones v. Citizens' S. & T. Co.* 646

Implied contract. See MASTER AND SERVANT, 1.

Same: By several instruments.

5. As a result of negotiations between the seller of corporate stock and the husband of the buyer, who had, however, no authority to act for her, the seller supposed that in addition to giving notes for $110,000 the buyer was to assume and pay a debt of about $15,000 owing by him to the corporation. The buyer supposed that the notes for $110,000 were to be in full payment. She executed said notes and, to secure them, an assignment of her interest in her father's estate, in which was a recital that the notes had been given in payment for the stock; and thereupon the seller executed to her an assignment of the stock. A note to the corporation for the amount of the seller's debt above mentioned, and a novation agreement as to said debt, reciting the execution of such a note, were drawn but were never presented to or signed by the buyer and she had no knowledge thereof. *Held,* that the instruments which were executed, taken together, constituted a complete writ-

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ten contract, the terms of which cannot be varied by parol evidence. It was incumbent upon the seller, under the circumstances, to see that the whole agreement was embodied in the written contract, and he cannot now claim that this was not done; nor can the buyer now avoid liability on such written contract according to its terms, on the ground that there was no meeting of the minds as to the price to be paid for the stock and hence no contract between the parties. *Miley v. Heaney,* 58

6. The buyer of the corporate stock, as above stated, not having agreed to assume or pay the seller's debt to the corporation, could not be held liable therefor by the corporation or its trustee in bankruptcy; nor was the seller's liability therefor discharged by the incomplete novation agreement, although that had been approved by the directors of the corporation. *Ibid.*

Same: In form prescribed by statute. See CARRIERS, 1. INSURANCE, 1–3.

Construction: Oral testimony to contradict writing. See BROKERS. DRAINS. EVIDENCE, 7. PARTNERSHIP, 1.

7. In the absence of proof of duress, fraud, mistake, excusable neglect, or other adequate reason, a written contract (in this case an accepted order for books) which speaks plainly, declares itself to be the entire contract, and is complete in itself, which negatives prior or contemporaneous oral agreements, and which says there are no conditions existing not expressed therein and that it is irrevocable, cannot be contradicted by parol testimony that there was a collateral agreement or condition not stated therein, such as, in this case, that the books were ordered subject to approval. *Edward T. Kelly Co. v. von Zakobiel,* 579

Same: Making decision of one party final: Legality.

8. The vesting in one of the parties to an executory contract of the power to decide finally all questions that may arise as to the contract, specifications, or execution of the work is not condemned by public policy any more than is a contract which is to be performed to the full satisfaction of one of the parties. In either case there must be the exercise of honest judgment, and the party performing the contract cannot be denied the fruits thereof by fraudulent, arbitrary, or capricious action on the part of the other. *Keachie v. Starkweather D. Dist.* 298

9. When the parties to an executory contract stand upon an equal footing and intelligently and deliberately provide therein for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, the contract should stand and the parties be made to abide by it and by the judgment of the tribunal of their choice; and the question whether it was a wise or provident contract is not material. *Ibid.*

Same: Practical construction.

10. A provision in a drainage contract that "no ditch or lateral shall be finally accepted until completed for its entire length, and . . . the contractor shall keep such ditch or lateral in good condition or repair at his own expense until it is finally accepted by the commissioners," did not require the commissioners to accept each ditch or lateral upon its completion, such an intent not being shown by any other provision in the contract and being negatived by the conduct of the parties. *Keachie v. Starkweather D. Dist.* 298

Termination of contract: Executory breach.

11. Where one party to an executory contract deliberately declares that he will not perform on his part, the other party may at his option treat the contract as terminated. *Ambler v. Sinaiko,* 286

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Waiver of requirement in specifications: Inspection of work: Contractor's duty.

12. Where a contract required that drainage ditches be dug to a one-to-one slope on the sides, the fact that the contractors, who found it necessary to use a floating dredge, explained to the commissioners that with such dredge the ditches could not be dug to the required slope but that by digging them wider and deeper than the contract called for the sides would in time cave in and thereby give the proper slope, and the fact that the commissioners permitted him to proceed in that way, did not show a modification of the contract or a waiver of the requirement of a one-to-one slope. *Keachie v. Starkweather D. Dist.* 298

13. Where one contracts to do a certain thing in a certain manner and in accordance with certain specifications it is his duty to make his work comply with the contract and specifications unless, by a provision for inspection or otherwise, he is relieved from that duty by the terms of the contract itself. *Ibid.*

Same: Waiver by intermediate payments.

14. Under a drainage contract intermediate payments were to be made each month, based upon approximate estimates of work performed during the preceding month. Such payments were to be a certain percentage of the contract price "for the work that shall be completed to the satisfaction of the commissioners." The contract did not provide for inspection of the work, and in practice the estimates were approximated by ascertaining the distance dug during the month, without any attempt to measure accurately the other dimensions of the ditches. Such measurements were in fact impracticable, owing to the manner in which the digging was done. *Held,* that by making the intermediate payments the commissioners did not waive their right to object that the work was not done according to the plans and specifications, even though they had from time to time called the contractors' attention to certain irregularities in the work which were manifest upon casual observation. *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, distinguished. *Keachie v. Starkweather D. Dist.* 298

Waiver of time of performance: Demand of delivery at later date.

15. Even if time was of the essence of a contract for the building of a truck to be delivered to plaintiff on or about April 1st, that feature was waived by plaintiff serving notices requiring delivery by certain later dates, and by his agreement on May 7th that if delivery was made by May 12th he would be satisfied. He could not rescind such last-mentioned agreement on May 10th. *Albright v. Stegeman M. C. Co.* 557

Waiver of architect's certificate: Condition precedent.

16. The contractor for the heating plant in a building, after partly installing the plant, became bankrupt and the trustee in bankruptcy did not elect to perform the contract. The surety on the contractor's bond, upon being notified of the default, declined to complete the contract but suggested that a new contract for completing the work be awarded to a certain furnace company. This was done without objection on the part of the original contractor, and the contract was completed by said furnace company at a fair price. The original contract provided that in case of such a default the expense incurred by the owner for finishing the work and any damage incurred through such default should be audited by the architects, whose certificate thereof should be conclusive. In view of the fact that such provision was mainly for the protection of the owner, it is *held,* in an action by the owner against the

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surety, that by its suggestion as to the completion of the work, upon which the owner acted, the surety waived the issuance of the architects' certificate as a condition precedent to recovery of the expense and damage. *School District v. Blystone,* 471

Performance or breach. See SALES, 1, 3.

Modification. See CONTRACTS, 12.

Ratification. See SCHOOLS AND SCHOOL DISTRICTS, 5. TOWNS, 5. WILLS, 9.

Rescission. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 15. CORPORATIONS, 2.

Cancellation. See CANCELLATION OF INSTRUMENTS.

Enforcing specific performance. See SPECIFIC PERFORMANCE.

CONTRIBUTION. See TOWNS, 6.

CONTRIBUTORY NEGLIGENCE. See AUTOMOBILES, 2, 6. MASTER AND SERVANT, 3–5. PLEADING. RAILROADS, 1–3. STREET RAILWAYS.

CONVERSION. See CORPORATIONS, 5.

CONVEYANCE, by foreign corporation. See CANCELLATION OF INSTRUMENTS. CORPORATIONS, 16–25.

CORPORATIONS.

Subscription contract: Fraud: Real purchaser.

1. In an action upon promissory notes given in payment for certain shares of corporate stock and to foreclose a lien created as collateral security, findings by the trial court that the maker of the notes was the real purchaser of the stock and signed the notes as principal and not merely as surety for her husband, and that the purchase was not induced by any fraudulent representations made by or on behalf of the seller, are *held* to be sustained by the evidence. *Miley v. Heaney,* 58

Sale of corporate stock. See CONTRACTS, 6. FRAUD, 4, 9. FRAUDS, STATUTE OF.

Delivery of stock held in pledge: Rescission: Waiver.

2. The assignment of corporate stock to a buyer thereof stated that the shares "have been and now are, with the consent of said [buyer], in escrow or pledge" to a certain bank as security for a certain debt of the corporation to the bank. The stock remained so pledged for a time, but was eventually delivered to the buyer. *Held,* that if the buyer ever had a right to rescind the contract because of failure to deliver the stock such right could not be exercised after the stock was in fact delivered and accepted. *Miley v. Heaney,* 58

Power of officers: Interested directors: Unlawful diversion of corporate assets: Managing officer. See CONTRACTS, 5.

3. The buyer of a majority of the stock of a corporation conducting a department store constituted her husband her agent in the management of the business, and thereafter, pursuant to an agreement between her, her husband as such manager, and the seller of the stock, the corporation from time to time delivered moneys and merchandise from the store to said seller, charging the same to said buyer as advances upon her share of the anticipated net earnings of the business, and the amounts thereof were credited by said seller upon the buyer's notes given to him in payment for his stock. *Held,* that this transaction was not a usual one in the ordinary course of business in which a managing officer could bind the corporation; and that where, as in this case, a majority of the

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board of directors were interested in such agreement adversely to the interests of the corporation, such board could not bind the corporation thereby unless all of the stockholders should with full knowledge assent thereto. *Miley v. Heaney,* 58

Same: Knowledge and consent of stockholders: Restoration: Action by trustee: Subrogation.

4. The advances so made being wholly out of proportion to anything said buyer was entitled to receive in the way of dividends, and the arrangement being in effect an attempt to finance her purchase of the stock by loans out of the assets of the corporation, the stockholders cannot be charged with acquiescence therein unless direct knowledge thereof on their part is shown. The fact that previously, for a number of years during which the corporation had been making large earnings but declaring no dividends, it had been the custom to allow stockholders to obtain advances as needed or asked for, such advances being charged on their open account and treated as in lieu of dividends, cannot be construed as an acquiescence in the loans here in question, especially as they were made at a time when the corporation was earning little if any money. *Miley v. Heaney,* 58

5. The assets of the corporation used in making advances, as above stated, to the seller of the stock or for his benefit and applied in discharge of the buyer's indebtedness to him on her notes, having been unlawfully diverted, both the buyer and the seller of the stock are liable for their restoration to the corporation or to its trustee in bankruptcy; but the seller, having applied the amount thereof on the buyer's indebtedness to him, should, if he pays that amount to said trustee in bankruptcy, be subrogated to such trustee's rights against the buyer. *Ibid.*

Directors' duty to protect stockholder's right to acquire share in increase of stock. See INJUNCTION.

6. It is the duty of the directors to protect a stockholder in his right to acquire a proportionate share of an increase in the capital stock of the corporation, and to offer him such share at a fixed price. Ordinarily the existing stockholders cannot be compelled to pay a bonus. *Dunn v. Acme A. & G. Co.* 128

Same: Treasury stock.

7. Where a corporation has purchased, retired, canceled, and placed in its treasury shares of its own stock it has thereby decreased its outstanding capital stock; and such shares cannot thereafter be sold and reissued without first giving to all the existing stockholders an opportunity to take their proportionate shares thereof. *Dunn v. Acme A. & G. Co.* 128

Same: Shares not retired.

8. If shares of its own stock purchased by a corporation have been treated as still outstanding, being carried upon its books as a liability, and have also been treated as an asset of the corporation, a different question is presented; but in any event the directors can dispose of such shares only in the honest exercise of their discretion, acting with the utmost good faith for the benefit of all stockholders, and not so as to give one faction or group of stockholders a benefit or advantage over another. *Dunn v. Acme A. & G. Co.* 128

Stockholder's right to examine books: Duty of officers.

9. The statutory right of the stockholder to examine the corporate books imposes upon the corporation not only the duty of keeping such books open for inspection at all reasonable times, but also

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the duty of keeping its stock subscriptions and accounts in such form that they may be examined and the condition of the corporate affairs ascertained therefrom. *Dunn v. Acme A. & G. Co.* 128

Same: Stockholders not chargeable with notice of entries in financial books.

10. Stockholders are not charged with knowledge of the contents of or entries in the ordinary financial books of account of a corporation. *Miley v. Heaney,* 58

Action for accounting: Injunction: Preservation of status quo: Sale of stock.

11. In an action by a stockholder against a corporation for an accounting, the refusal to grant a temporary injunction preserving the *status quo* by restraining the sale of certain treasury stock was not justified by a claim, unsupported by the facts, that such sale was necessary to, and would, enable the company to become legally incorporated; nor was such refusal justified by the claim that the sale was necessary because of the indebtedness of the company, the amount for which the stock was in fact sold being so small as compared with the indebtedness that it could not affect materially the company's financial standing. *Dunn v. Acme A. & G. Co.* 128

12. The right of a stockholder to acquire his proportionate share of a reissue of stock which had been purchased and retired by the corporation is not a mere privilege which is waived by his failure to offer to purchase the stock or attempt to bid therefor when it is offered for sale to the highest bidder; and especially is this so where the books of the corporation are so incomplete and fragmentary that the real value of the stock cannot be ascertained. *Ibid.*

Action to recover assets unlawfully diverted. See BANKRUPTCY, 2. BILLS AND NOTES, 1, 2.

Loan to corporation. See TRIAL, 4.

Execution of contracts: Officer's signature: Waiver. See CONTRACTS, 2.

Foreign corporations: Capital stock. See CONSTITUTIONAL LAW, 3. TRADING STAMPS, 4.

13. The words "capital stock," as used in sub. 7 (e) of sec. 1770*b*, Stats., mean the stock actually issued and paid for, not the authorized capital stock of the corporation. *State ex rel. Standard Oil Co. v. Hull,* 269

Same: Contracts: Interstate commerce: Enforceable contracts.

14. A foreign corporation, not licensed to do business in Wisconsin, sold and delivered a unitype machine to a resident of this state under a conditional sale contract by the terms of which title was to be retained by the seller until the purchase price, for which notes were given, was fully paid. The purchaser died before the notes were all paid, and his widow continued his business and the use of the machine. Afterwards she and the seller entered into a new conditional sale contract with somewhat different terms, and she gave new notes, the old agreement being released and the unpaid notes of the deceased surrendered. *Held* that, the title of the machine never having passed and the substitution of the new contract being an ordinary incident of commerce, the interstate character of the whole transaction was not destroyed; and the notes given by the widow were valid and enforceable. *Sprout, Waldron & Co. v. Amery M. Co.* 162 Wis. 279, distinguished. *Unitype Co. v. Schwittay,* 489

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15. The facts that at the time of making the new contract the seller made a reduction in the balance due and that it then placed a new attachment on the machine did not alter the character of the transaction as an interstate sale. *Ibid.*

Same: Conveyances of land: Validity of deeds.

16. Sec. 1770*b*, Stats., prohibiting unlicensed foreign corporations (with certain exceptions) from transacting business or acquiring, holding or disposing of property in this state, applies not only to bilateral and executory contracts, but also to executed contracts and unilateral instruments of transfer, including deeds or conveyances of land in Wisconsin given pursuant to antecedent contracts, written or oral. *Wis. Trust Co. v. Munday,* 31

17. Conveyances in February, 1913, of real property located in this state to a foreign corporation which had not complied with sec. 1770*b*, Stats. 1911, were absolutely and wholly void as to said corporation and its grantees, even though the deeds were given pursuant to and as part of a contract negotiated and executed by the parties outside of this state, and as a part of the transaction the Wisconsin owner of the real estate received shares of stock in said foreign corporation. *Ibid.*

18. The contract in such case was not one relating to interstate commerce, since that implies as a necessary element the transportation of goods between states. *Ibid.*

19. Compliance with the statute by the grantee corporation in 1915 did not validate such deeds executed in 1913. [What effect, if any, the enactment of ch. 212, Laws 1913, amending sec. 1770*j*, Stats., had as to title attempted to be conveyed to corporations which complied with sec. 1770*b* after the enactment of said sec. 1770*j* (by ch. 142, Laws 1911) and prior to the passage of said ch. 212, Laws 1913, is not determined.] *Ibid.*

20. By the enactment of ch. 211, Laws 1917, sec. 1 of which amends sub. 2, sec. 1770*b*, and sub. 1, sec. 1770*j*, the legislature intended only to exempt from the provisions of sec. 1770*b* "corporations not organized or conducted for profit," and to confirm and validate titles theretofore attempted to be acquired by exempted corporations. The words "before the passage of this section," having been a part of sec. 1770*j* as originally created (by ch. 142, Laws 1911), refer, when repeated in the amended section, to the original enactment of said sec. 1770*j*, and not to the passage of sec. 1 of the amending act of 1917. *Ibid.*

21. Sec. 1770*b*, Stats., is a declaration of a public policy of this state, its purpose being to compel foreign corporations to comply with its terms before transacting business in the state or attempting to acquire or hold property situated within the state. Annulment or cancellation of contracts which are void under that section is therefore not a matter of purely private or personal interest, and will not be denied merely upon the ground that it would be inequitable or that the party seeking such relief is estopped to claim the benefit of the statute. So *held* in a case where, pursuant to a contract between the parties, real property located in Wisconsin was conveyed by the Wisconsin owner, with special covenant of warranty as against any person claiming through or under him, to a foreign corporation which had not complied with said sec. 1770*b*, and as part of the transaction the grantor became a stockholder in said corporation and then, with full knowledge that the corporation was about to deal with the title to the property conveyed, stood by and permitted the title to be pledged for money borrowed. *Ibid.*

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Same: Ratification of void deed.

22. A covenant of warranty contained in a deed made void by sec. 1770*b*, Stats., cannot be held to be a ratification of the making of the deed itself, nor to be an election to affirm, and a validation of, a contract the making of which and the execution and delivery of the deed constituted a single transaction, especially where, as in this case, the grantors thereafter moved with promptness to assert the invalidity of the deed and to recover the property conveyed. *Wis. Trust Co. v. Munday,* 31

23. The fact that the transaction by which real property in Wisconsin was conveyed to a foreign corporation contemplated that it should be conveyed by such corporation (a dealer in real estate) to others, is not significant upon the question of the validity of the conveyance under sec. 1770*b*, Stats.,—the purpose of every conveyance being to enable the grantee to deal with the property as his own. *Ibid.*

24. The creation of sec. 1770*j*, Stats., by ch. 142, Laws 1911, granting relief to corporations which had inadvertently or mistakenly supposed that sec. 1770*b* was not applicable to their particular situation but which had complied with its provisions prior to the passage of said ch. 142, did not indicate a purpose to change the legislative policy of the state or to relieve foreign corporations thereafter transacting business or acquiring property within this state from complying with said sec. 1770*b*. *Ibid.*

25. Conveyances of real property located in this state to a foreign corporation which had not complied with sec. 1770*b*, Stats., and which was not relieved from its disability by sec. 1770*j*, being void and not voidable only, it is immaterial whether or not persons subsequently loaning money upon the faith of such conveyances failed to exercise ordinary care with respect to the ownership of the property. *Ibid.*

Educational corporation. See TAXATION, 10.

COST of buildings. See TAXATION, 6.

COSTS.

Liability of intervening defendants. See COURTS, 8–10.

1. A defendant who has intervened in an action is not chargeable with costs which accrued prior to the time of his intervention. *Dring v. Mainwaring,* 139

When discretionary. See COURTS, 11.

Offer of judgment: Effect.

2. Under sec. 3628, Stats., if the plaintiff does not accept an offer of judgment duly made and fails to recover a more favorable judgment, he cannot recover costs made after the making of such offer, but must pay costs so made to the defendant. *Pahl v. Komorowski,* 553

3. The fact, in such a case, that the action is tried *de novo* in the circuit court on appeal does not affect the defendant's rights under sec. 3628, Stats. *Ibid.*

COUNTERCLAIM. See EXECUTORS, 2. SALES, 1.

COUNTIES. See EVIDENCE, 2. OFFICERS, 2.

COUNTY COURT. See COURTS.

COUPONS. See TRADING STAMPS.

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COURT COMMISSIONERS.

Appointment by judge out of state.

1. The appointment of a court commissioner by the circuit judge is a ministerial or administrative, not a judicial, act. Not being a completed act until filed as required by sec. 113.14, Stats., an appointment made by the judge while out of the state is valid when so filed. *State ex rel. Hazelton v. Turner,* 170

Same: Term of office.

2. Under sec. 113.14, Stats., after the expiration of the term of office of the circuit judge who appointed him, a court commissioner merely holds over until his successor is appointed and qualified, even though the judge has been re-elected and has entered upon another term. *State ex rel. Hazelton v. Turner,* 170

Vacancy by accepting federal office.

3. Under sec. 3, art. XIII, Const. Wis., acceptance of the office of United States commissioner by a court commissioner of this state *ipso facto* vacated the latter office; and no proceeding to declare the office vacant was necessary. *State ex rel. Hazelton v. Turner,* 170

COURTS.

Supreme court. See APPEAL AND ERROR.

Same: Supervisory power over inferior courts.

1. The superintending control over inferior courts, vested in the supreme court, provides an ample and speedy remedy where a trial court fails to perform an imperative duty and there is no adequate remedy by appeal. *Notbohm v. Pallange,* 225

Same: Termination of jurisdiction: Motion for rehearing.

2. Under sec. 3071, Stats., the jurisdiction of this court in a case brought here by appeal or writ of error ceases at the end of sixty days from the date of its decision of the case, even though the clerk has not actually remitted the papers to the lower court, unless such papers have been retained by order of this court made within said sixty days. *Bassett v. Chicago & N. W. R. Co.* 617

3. After the jurisdiction of this court has so terminated, an order therein opening the default of a party to move for a rehearing and permitting him to file such a motion is a nullity. *Ibid.*

Same: Failure of counsel to indicate statute.

4. Although, owing to the omission of counsel for both parties to call attention to the Cummins amendments (of March 4, 1915, and August 9, 1916) to the interstate commerce act, the decision and judgment in this case were based upon the law as it existed prior to such amendments, yet, no order directing retention of the record and no application for relief by way of a motion for rehearing or otherwise having been made within sixty days after such decision, this court is powerless to reopen the case and determine the rights of the parties under said amendments. *Bassett v. Chicago & N. W. R. Co.* 617

Circuit courts: Rules of court: Relief under statutes.

5. Rules prescribed for the guidance of circuit courts, where clear and unambiguous, must be followed. If injustice ensues through mistake, inadvertence, surprise, or excusable neglect, relief may be had under the statutes (secs. 2831, 2832, or others), upon proper application and showing. *Rymer v. Mart,* 493

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Same: Appeals from justice's court.

6. Under sec. 4 of Circuit Court Rule XXIX as it stood prior to the amendment of June 5, 1918, a circuit court had no power, in a case appealed from a justice's court wherein no answer had been interposed, to grant leave to answer after the first general term at which the case was properly triable. *Rymer v. Mart,* 493

Commissioner. See COURT COMMISSIONERS.

Concurrent jurisdiction. See EXECUTORS.

County courts: Lack of jurisdiction: Transfer to proper court: Jurisdiction of parties. See EXECUTORS. OFFICERS, 1, 2.

7. Under sec. 2836*b*, Stats., although the court in which this action was brought had no jurisdiction thereof, it acquired jurisdiction of the original parties, and also had power to permit another defendant to intervene and acquire jurisdiction of his person, where such intervention took place before the question as to jurisdiction of the action was raised or the issues had been made up so that that question could be determined. *Dring v. Mainwaring,* 139

Same: Taxation of costs.

8. Where an action brought in a county court which had no jurisdiction thereof was certified, under sec. 2836*a*, Stats., to the circuit court having jurisdiction, the question of costs remained open, to abide the final decision in the action; and where that decision was in plaintiff's favor the circuit court had jurisdiction to, and might properly, tax against the defendants plaintiff's costs and disbursements necessarily incurred in the county court which were identical with those which would have been incurred had the action been originally brought in the circuit court. This would not include costs growing out of a trial in the county court, that proceeding being a mere nullity and such costs not being necessarily incurred. *Dring v. Mainwaring,* 139

Same: Inconsequential error.

9. Although a judgment of the circuit court in such a case, in which costs were not taxed against a defendant because the court held that it had no jurisdiction to tax them, was erroneous, it is not reversed on appeal, the amount of the costs which might have been taxed being inconsequential. *Dring v. Mainwaring,* 139

10. A defendant who, in such a case, had been lawfully permitted by the county court to intervene in the action, could not, after the transfer of the action to the circuit court, withdraw from the case without the permission of the latter court and thereby escape liability for costs. *Ibid.*

Milwaukee civil court: Costs: When not discretionary.

11. The special provision in sec. 14 of the Milwaukee civil court act (ch. 549, Laws 1909, as amended by ch. 320, Laws 1913), relating to costs in actions governed by the statutes applicable to justices' courts, is controlling as against the general provision in sec. 24 that costs are in the discretion of the judge before whom the action is tried. *Pahl v. Komorowski,* 553

Same: Error justifying reversal by circuit court.

12. A judgment of the Milwaukee civil court should not be reversed by the circuit court in the absence of error such as would justify a reversal of a judgment of the circuit court by the supreme court. *Yahnke v. Lange,* 512

COVENANTS. See DEEDS, 2. INNS AND INNKEEPERS. CORPORATIONS, 22, 23.

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CRIMINAL LAW.

Practice of optometry without license: Evidence.

1. The evidence in this case, showing, among other things, that defendant tested the eyes of a patient by means of a "big frame," different lenses, and a card with different sized letters thereon, until he found that her eyes were good, and then he gave her a pair of even glasses,—is *held* sufficient to show that he violated sec. 1435*f*—35, Stats. 1917, by employing "means, other than the use of drugs, for the measurement of the powers of vision and the adaption of lenses for the aid thereof." *Price v. State,* 603

2. After providing that every person who, not having obtained the required certificate, "shall hold himself out to the public as qualified to engage in the practice of optometry" shall be guilty of a misdemeanor, etc., the act further provides that nothing therein shall be construed to apply "to persons who shall sell spectacles from an established place of business without attempting to test the eyes." *Held,* that the act is not to be construed as permitting one who sells spectacles without attempting to test the eyes to hold himself out to the public as qualified to engage in the practice of optometry. *Ibid.*

Specific offenses.

False pretense. See FALSE PRETENSES, 1–7.
Homicide. See HOMICIDE, 1–4.
Manslaughter. See HOMICIDE.
Monopoly. See MONOPOLIES, 2.
Murder. See HOMICIDE.
Refusal to deliver records. See TAXATION, 7.
Unlawful sale. See INTOXICATING LIQUORS, 1, 2.

CULPABLE NEGLIGENCE. See HOMICIDE, 4.

CULVERTS. See BRIDGES.

CUMMINS AMENDMENT. See COURTS, 4.

CUMULATIVE REMEDIES. See SALES, 6.

CUSTOM. See CARRIERS, 4.

DAMAGES.

See PHYSICIANS AND SURGEONS, 6. SPECIFIC PERFORMANCE, 1, 2. TOWNS, 3.

Excessive.

1. An award of $1,800 (reduced by the court from $4,000) as damages for publication of a libelous newspaper article constituting a serious reflection upon the plaintiff in his professional and official capacities, is *held* not excessive. *Walters v. Sentinel Co.* 196

Limited by contract. See CARRIERS, 7.

Treble damages. See TELEGRAPHS AND TELEPHONES, 1, 2.

Liquidated or penalty? Difficulty of ascertainment.

2. Provisions in a drainage contract that for so much of certain specified quantities of the excavation as should not be completed at specified dates the contractors should in each case forfeit "as liquidated damages" a percentage (varying from ten to twenty per cent.) of the contract price for the performance of the excavation so remaining uncompleted in each particular instance at the date specified, are construed as calling not for penalties but for liquidated damages, there being nothing to indicate that the parties did not so intend and the situation being such that a compu-

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tation of actual damages would be extremely difficult. *Keachie v. Starkweather D. Dist.* 298

DEALER'S COUPON. See TRADING STAMPS, 1.

DEATH. See AUTOMOBILES, 1. RAILROADS, 1. WORKMEN'S COMPENSATION, 11, 16.

DEBTOR AND CREDITOR. See BAILMENTS. BANKRUPTCY. BILLS AND NOTES. CORPORATIONS, 3, 14. EXECUTORS, 1, 2. HUSBAND AND WIFE. INTEREST. SALES.

DEEDS.

See TAXATION, 1. WILLS, 8.

Execution: Susceptibility of grantor to undue influence.

1. In an action to set aside a conveyance by an aged woman, for a small consideration, of a large part of her property to her daughter (one of five children), findings by the trial court to the effect that the deed was not procured by fraud or undue influence of the grantee or her husband, an attorney, are *held* to be sustained by the evidence, both the grantor's susceptibility to such influence and the disposition of the defendants to exercise it being disproved. *Nyhagen v. Markham,* 91

Validity. See CORPORATIONS, 16, 21–23.

Covenant restricting use of building: "Hotel" or lodging house. See INNS AND INNKEEPERS.

2. The owner of two hotel buildings in a city conveyed one of them to plaintiff, with a covenant that the other should not be used as a hotel for fifteen years from the date of the deed. Afterwards the other building was fitted up and opened for the accommodation of the public and of transient guests, who registered as in a hotel and were charged a fixed rate per day, and an office, a lobby, and a parlor for the common use of guests were maintained therein. Persons who lodged in the building regularly for long periods of time were also accommodated. No meals were served in connection with the business. *Held,* that the building was thereby used, not merely as a lodging house, but as a "hotel" and in violation of the restrictive covenant above mentioned. *Huntley v. Stanchfield,* 119

Action by successive grantees.

3. By the inclusion of such restriction in subsequent successive deeds of said other building it became binding upon the grantees thereof and enforceable against them by the plaintiff, for whose benefit the restrictive covenant was first made. *Huntley v. Stanchfield,* 119

DE FACTO OFFICERS. See ELECTIONS, 1, 3. OFFICERS, 1.

DEFINITIONS. See WORDS AND PHRASES.

DE JURE OFFICERS. See OFFICERS.

DEMURRER. See ATTORNEY GENERAL, 2. CERTIORARI. MANDAMUS.

DEPRECIATION. See TAXATION, 6.

DIRECTION OF VERDICT. See ATTORNEY AND CLIENT. FRAUD, 1.

DISCOVERY. See LIBEL AND SLANDER, 11, 12.

DISCRETION. See DIVORCE, 2. HOMICIDE, 2. TRIAL, 1.

DISSOLUTION of partnership. See PARTNERSHIP.

DIVISION of property. See APPEAL, 8. DIVORCE, 1.

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DIVORCE.

Agreement for divorce: Division of property: Public policy. See APPEAL, 8.

1. An agreement between husband and wife, pending an action by the wife for a divorce, pursuant to which he conveyed his real and personal property to her and she paid him a certain sum in money and executed for his benefit two notes secured by mortgage on said real property, the sole consideration being that he would not make any contest in the divorce action and that upon such division of the property they would abandon marital relations, was void as against public policy, and as to executory parts thereof the courts will not grant relief. The husband, therefore, is not entitled to enforce the notes and mortgage given by the wife. *Bergevin v. Bergevin,* 466

Division of property: Allowance to wife: Discretion of court.

2. The rule that, upon a final division of the husband's property, from one half to one third is a proper allowance to the wife is not inflexible. Each case must depend upon its own particular facts and the amount to be allowed rests in the sound discretion of the court. *Roder v. Roder,* 283

3. In this case an allowance to the wife of one third of the net value of the husband's property is *held* too large and is greatly reduced. *Ibid.*

Same: Effect of wife's misconduct.

4. Wilful desertion of the husband by the wife and misconduct on her part are proper to be considered in making a division of property. *Roder v. Roder,* 283

Custody of children on denial of divorce: Separate maintenance. See PARENT AND CHILD, 2.

5. Under sec. 2366, Stats., a judgment denying a divorce may award to the wife the custody of the minor children and require the husband to pay a reasonable amount for her and their support living apart from him; and such a judgment in this case is *held* not to have been an abuse of discretion. *Penn v. Penn,* 267

DOCUMENTARY EVIDENCE. See EVIDENCE, 7.

DRAINS.

See CONTRACTS, 9. DAMAGES, 2. TOWNS, 4.

Drainage commissioners as arbiters: Sufficiency of work: Mistake or fraud.

1. In a contract with a drainage district for the excavation of certain ditches a provision that "in the interpretation of these specifications and the contract and upon all questions concerning the execution of the work the decision of the [drainage] commissioners shall be final," is valid and confers upon the commissioners the same powers as are conferred upon architects by similar provisions in building contracts. *Keachie v. Starkweather D. Dist.* 298

2. Findings by the commissioners in such case, after completed performance is claimed, as to the amount of excavation still necessary and as to other delinquencies on the part of the contractors, are final, binding, and conclusive unless impeached for fraud or for mistake so gross as to amount to constructive fraud. *Ibid.*

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Same: Estoppel to assert insufficiency of work: Statements expressing satisfaction: Recitals in stipulation: Renewing bond.

3. Neither a statement, in an annual report by the commissioners to the circuit court, that work according to the plans was progressing in a satisfactory manner except as to the rapidity with which it was being done, nor a stipulation, made by all parties upon a renewal of the contractors' bond, to the effect that up to that time the contract had been satisfactorily performed in accordance with its terms, except as to the time for completion, operated as a waiver or an estoppel with respect to the right of the commissioners to assert that work theretofore done was not in accordance with the plans and specifications, there being no evidence that the contractors knew of said report or were in any manner influenced by it, or that the stipulation in any way affected their subsequent conduct, and it affirmatively appearing that they did not construe either document as an expression of the commissioners' satisfaction with the work already completed or as indicating an acceptance thereof. *Keachie v. Starkweather D. Dist.* 298

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 9.

DURESS. See CONTRACTS, 7.

EDUCATIONAL CORPORATIONS. See TAXATION, 10.

ELECTION to declare contract void. See SALES, 4.

ELECTION OF REMEDIES. See SALES, 6.

ELECTIONS.

Canvass of returns on license question: Madison city charter: De facto officers: Special city charter. See ATTORNEY GENERAL, 3.

1. Where the mayor and holdover aldermen of the city of Madison, claiming in good faith to be the legal board of canvassers, met and canvassed the votes cast at a referendum election on the question of license, they constituted a *de facto* canvassing board and the canvass was valid. *State ex rel. Haven v. Sayle,* 159

2. Under the special charter of the city of Madison (ch. 36, Laws 1882) and sec. 1565*a*, Stats., the mayor and holdover aldermen constitute the proper canvassing board in that city, not only for the regular municipal election, but also for a referendum election on the question of license. *Ibid.*

3. The provision in sec. 10.42, Stats., that "except as otherwise provided by law, the common council of every city shall canvass the returns and declare the result of every annual, special or referendum election held in and for such city," does not supersede or affect different provisions on that subject in special city charters. *Ibid.*

EMPLOYER'S LIABILITY. See MASTER AND SERVANT. WORKMEN'S COMPENSATION.

EQUITABLE ESTOPPEL. See SPECIFIC PERFORMANCE, 3.

EQUITY. See CANCELLATION OF INSTRUMENTS, 1, 4. JURY. MUNICIPAL CORPORATIONS, 4. PARTNERSHIP, 2. SPECIFIC PERFORMANCE, 1.

ESCROW. See CORPORATIONS, 2.

ESTATES. See WILLS, 2.

ESTOPPEL. See CANCELLATION OF INSTRUMENTS, 2. CORPORATIONS, 1. DRAINS, 3. INSURANCE, 4.

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EVIDENCE.

Presumptions. See CARRIERS, 5. GARNISHMENT, 1. INTOXICATING LIQUORS, 2. MUNICIPAL CORPORATIONS, 2. TRIAL, 3. WORKMEN'S COMPENSATION, 5, 16.

Burden of proof. See CARRIERS, 5. RAILROADS, 3.

Relevancy, materiality, and competency. See CONTRACTS, 7, 9. CORPORATIONS, 25. FRAUD, 11. HOMICIDE, 1. LIBEL, 14. PHYSICIANS AND SURGEONS, 3. WORKMEN'S COMPENSATION, 11.

Judicial notice: Boundaries of political subdivisions. See MUNICIPAL CORPORATIONS, 1.

1. The courts will take judicial notice of public records of the state defining the boundaries of its various political subdivisions. *Ryan v. State,* 14

2. Although a county map or atlas showing, as part of a village, a platted area adjacent to but outside of its original boundaries is sufficient to raise a question as to the exact boundaries, that question must be determined by the public records; and the courts will take judicial notice that such boundaries have not been changed in the manner provided by statute since the original incorporation of the village. *Ibid.*

Presumptions: Value from consular invoice.

3. A consular invoice, duly issued and certified in accordance with the federal statutes, was admissible in evidence under secs. 4148, 4164, Wis. Stats., and was at least presumptive evidence of the value of goods which, during the transit, had been abstracted from the package. *Vogel v. Delaware, L. & W. R. Co.* 567

Same: Execution of instruments by those not parties to the action.

4. Sec. 4192, Stats., making written instruments purporting to be signed or executed by any person proof that they were so signed or executed until denied, applies to signatures of persons not parties to the action. *Vogel v. Delaware, L. & W. R. Co.* 567

Admissions: Declarations by agent.

5. Declarations made by an agent during the transaction of business by him for his principal, in relation to such business and within the scope of his agency, are admissible in evidence as against the principal. *Vogel v. Delaware, L. & W. R. Co.* 567

Weight and sufficiency. See AUTOMOBILES, 6. BILLS AND NOTES, 1, 2. CARRIERS, 6. CONTRACTS, 4. CORPORATIONS, 1. COURTS, 12. FRAUD, 1. INTOXICATING LIQUORS, 1. LIBEL AND SLANDER, 1. MASTER AND SERVANT, 2, 3, 5. NEGLIGENCE. PARTNERSHIP. PHYSICIANS AND SURGEONS, 1, 2. RAILROADS, 2. TRIAL, 3. VENDOR AND PURCHASER, 3. WORKMEN'S COMPENSATION, 11, 14.

Conclusiveness of uncontradicted testimony.

6. Testimony which is uncontradicted, not against established facts or reasonable probabilities, and in no way discredited must be accepted as true by the jury. *Quass v. Milwaukee G. L. Co.* 575

Documentary evidence: Transaction with deceased person. See WILLS, 3.

7. Where a contract between plaintiffs and a partnership was made by letters between them, those on behalf of the partnership being written by a partner since deceased, such letters are not inadmissible in evidence on the ground that they constituted a "transaction or communication" with a deceased person within the meaning of

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sec. 4069, Stats. Such letters would not be subject to contradiction by oral testimony of the deceased partner if he were living. *Jones v. Citizens' S. & T. Co.* 646

EXAMINATION of adverse party. See LIBEL AND SLANDER, 11, 12.

EXCEPTIONS. See APPEAL, 8. SCHOOLS AND SCHOOL DISTRICTS, 4.

EXCESSIVE DAMAGES. See DAMAGES, 1.

EXCISE LAWS. See INTOXICATING LIQUORS.

EXECUTIONS. See SALES, 4.

EXECUTORS AND ADMINISTRATORS.

Claims against decedents: Concurrent jurisdiction: Waiver. See WILLS, 6.

1. As to claims against a deceased person, if the remedy in the court administering his estate is not full and complete the concurrent jurisdiction of the circuit court may be invoked. So *held* in the case of a claim against a partnership where it was desired to proceed against the estate of a deceased partner (which was being administered in an Ohio court) and the surviving partner and also to garnish a debt owing to the partnership by a Wisconsin corporation. *Jones v. Citizens' S. & T. Co.* 646

2. Where, in such case, the defendants appeared generally in the action and joined in a counterclaim against the plaintiffs, they waived any objection that the Ohio court had primary jurisdiction of the matter. *Ibid.*

EXECUTORY BREACH. See CONTRACTS, 11.

EXEMPTION. See GARNISHMENT, 2. TAXATION, 10.

EX POST FACTO LAWS. See CONSTITUTIONAL LAW, 9.

EXTENSION OF TIME. See APPEAL, 4.

FAIR COMMENT. See LIBEL AND SLANDER, 4.

FALSE PRETENSES.

What are.

1. Acts or conduct may constitute false pretenses. *Stecher v. State,* 183

Indictment and information: Evidence.

2. An information following the language of sec. 4423, Stats., and charging defendant with obtaining by false pretenses a power of attorney to mortgage certain land of another person and, by placing a mortgage thereon, designedly and with intent to defraud obtaining money, is *held* sufficient, even as against an objection made before trial,—the false representations, which consisted largely of conduct and a course of dealing rather than oral misrepresentations, being stated as fully as the circumstances would permit, and defendant being fully apprised thereby of the offense with which he was charged. *Stecher v. State,* 183

3. Where such information alleged that the woman who signed the instrument had by the false representations of defendant been led to believe that it was a paper which would assist him in selling the property for her, and that she was induced by his false pretenses and representations to deliver to him a power of attorney to mortgage the land, an allegation in terms that she relied upon the representations was not essential. *Ibid.*

4. The evidence in such case (stated in the opinion) is *held* sufficient to sustain a conviction. *Ibid.*

Confidence game: Gross fraud or cheat at common law.

5. One who, knowingly and with intent to defraud, falsely advertises

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and represents that a certain entertainment and celebration conducted and managed by him is for the benefit of the Red Cross, when it is not; that "the committee" (posters being so signed) is acting for the Red Cross, or some part of the public, when it is not; and that he is engaged in the business of securing funds for the Red Cross, when he is not, and who by such means obtains moneys which he would not otherwise obtain, is guilty of the offense of obtaining money under false pretenses as defined by sec. 4423, Stats. 1917. *State ex rel. Labuwi v. Hathaway,* 518

6. Such acts do not constitute the offense of playing the confidence game mentioned in sec. 4568*m*, Stats. 1917. That statute seems to contemplate that some visible material token or symbol shall be used or manipulated in such a manner that the confidence of the victim is gained, or in such a manner as to inspire confidence in the victim that he can beat the manipulator at his own game. *Ibid.*

[7. Whether such acts constitute a gross fraud or cheat at common law, under sec. 4430, Stats. 1917, not considered.] *Ibid.*

FALSE REPRESENTATIONS. See FRAUD.

FINDINGS OF FACT. See PARTITION. TRIAL, 5.

FIXTURES. See TAXATION, 1.

FORECLOSURE.
Of land contract. See VENDOR AND PURCHASER, 5.
Of lease. See LANDLORD AND TENANT, 4.
Of lien. See CORPORATIONS, 1.

FOREIGN CORPORATIONS. See CANCELLATION OF INSTRUMENTS, 4. CONSTITUTIONAL LAW, 3, 7.

FRAUD.

See ATTORNEY AND CLIENT. BANKRUPTCY, 1. CANCELLATION OF INSTRUMENTS, 1, 2. CONTRACTS, 7, 8. CORPORATIONS, 1. DEEDS, 1. DRAINS, 2. FALSE PRETENSES, 1. INSURANCE, 6. PRINCIPAL AND AGENT. REPLEVIN. TRADING STAMPS, 2. VENDOR AND PURCHASER, 5. WILLS, 9.

Deception constituting: Representation to cure insane person by hypnotic influence: Injury to such person.

1. In replevin to recover a bank draft alleged to have been obtained by defendant through fraudulent representations that he was a licensed physician and could by the use of hypnotic influences cure plaintiff's insane wife, it is *held*, upon the evidence, to have been a question for the jury whether or not plaintiff was so deceived and defrauded; and the direction of a verdict for defendant was error. *Roesler v. Shastri,* 153

2. There being evidence in such case sufficient to warrant a finding that defendant held himself out as a doctor, the fact that he was not required to be licensed to heal by mental science or hypnotic suggestion is immaterial on the question of actual fraud. *Ibid.*

3. Although in such case the defendant admitted on the trial that plaintiff's wife was neither cured nor benefited, the plaintiff should have been permitted to prove that she had been injured by the treatment, such proof being pertinent on the issue of fraud. *Ibid.*

Statements of value made without knowledge of falsity: Belief of maker.

4. Where defendant, without knowledge on the subject, assumed to know and stated as a fact, for the purpose of inducing plaintiff to buy certain corporate stock, that it was worth $15 per share, and such statement was untrue, the fact that defendant did not know

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his statement to be false, or believed it to be true, does not preclude liability on his part as for a deceit. *Bechmann v. Salzer,* 277

5. A statement as to the value of land, made by the vendor to the purchaser, was not a mere expression of opinion but a representation of a fact where the purchaser, under all the circumstances of the case, was justified in relying thereon. *Karls v. Drake,* 372

6. It is not the rule, in such a case, that a statement concerning value is to be regarded as a representation of a fact only where the purchaser is induced by artifice, trick, or fraud to rely thereon. *Horton v. Lee,* 106 Wis. 439, explained. *Ibid.*

Same: Unaccompanied by expression of value.

7. A false representation made by the seller of property to the buyer that another prospective buyer had inquired as to the amount for which the property could be bought, if not accompanied by any representation as to what such other person would pay or any misrepresentation as to the value of the property or any other material fact, did not constitute actionable fraud. *Miley v. Heaney,* 58

Same: Persons protected.

8. The law as to deceit is intended to protect the ignorant and credulous as well as the wise and wary. *Roesler v. Shastri,* 153

Right of action not barred by failing to investigate: Laches.

9. In actions by the purchasers against an agent of a corporation for breach of a contract to repurchase stock, brought within a reasonable time after they discovered the falsity of his statements and after they became dissatisfied, a recovery is *held* not to be barred by laches, although the implicit confidence which plaintiffs had in defendant had lulled them into security and the belief that his statements were true and had prevented as speedy and thorough an investigation as would otherwise have been made. *Lingelbach v. Luckenbach,* 481

10. Time alone is not the essence of laches, but every case must be determined on its own facts. *Ibid.*

Evidence: Real value of stock of corporation as disclosed by books.

11. In an action for deceit whereby plaintiff was induced to buy certain corporate stock at a price much higher than its real value, testimony of the secretary of the corporation and the books and trial balances identified by him, showing assets, liabilities, earnings, etc., are *held* to have been material and relevant to the issues. *Bechmann v. Salzer,* 277

Same: Degree of proof required: Instructions to jury: Harmless error.

12. In an action for deceit the burden is upon plaintiff to establish the elements of the fraud by a clear and satisfactory preponderance of the evidence; but the refusal of the trial court so to instruct the jury in this case, and an instruction to the effect that as to certain elements of the alleged fraud the jury must be "satisfied by a fair preponderance of the evidence," are *held* not to have misled the jury or to have constituted prejudicial error, in view of the nature of the evidence and the correct charge given as to the other elements of the alleged fraud. *Bechmann v. Salzer,* 277

FRAUDS, STATUTE OF.

Contract of indemnity.

Where an officer of a corporation, acting as its agent, sold stock therein and received a commission on the sales, and at the same time orally agreed that if the purchasers became dissatisfied or if the statements made by him should be found to be untrue he would

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individually purchase the stock from them at the price they paid therefor, such oral contract was valid as a contract of indemnity and was not within the statute of frauds. *Lingelbach v. Luckenback,* 481

FREEHOLD. See TAXATION, 1.

FRONT-FOOT VALUE. See TAXATION, 4.

GARNISHMENT.

See EXECUTORS, 1.

Individual bank account: Joint account: Presumption.

1. A deposit in a bank in the name of a wife, with authority to the bank to honor checks drawn thereon by the husband, is *prima facie* an individual account, not a joint account which is not subject to garnishment. *Rymer v. Mart,* 493

Judgment on failure to answer: Exemptions.

2. Where the garnishee fails to make any answer, judgment may be rendered against him without proof that the garnished fund is not exempt from execution. *Rymer v. Mart,* 493

GAS. See NEGLIGENCE.

GOOD TITLE. See VENDOR AND PURCHASER, 4.

GOVERNOR. See ATTORNEY GENERAL, 5.

GROSS FRAUD. See FALSE PRETENSES, 7.

GUARDIAN AND WARD.

See WILLS, 9.

Action for money belonging to ward: Court.

It seems that an action by a general guardian to recover money belonging to his ward may be brought in the circuit court. *Gill v. Hermann,* 589

HEIRS AND ASSIGNS. See WILLS, 2.

HERNIA. See WORKMEN'S COMPENSATION, 13.

HIGHWAYS.

See BRIDGES. TELEGRAPHS AND TELEPHONES, 1, 2.

Laying out highway: Lack of notice: Jurisdiction of town board. See TOWNS, 3.

1. Where, by reason of a failure to give the notices required by sec. 1267, Stats., or the fact that it is not satisfied that such notices have been duly given (sec. 1268), a town board has no jurisdiction to act on the day fixed for its meeting to decide upon an application for the laying out of a highway, it may, unless its power has otherwise been exhausted, proceed *ab initio,* order the service of new notices in the manner required by law, and thereby acquire jurisdiction for future valid action. *State ex rel. Loehr v. Hanson,* 497

Same: Constructive refusal of town board: Appeal.

2. Under sec. 1276, Stats. (providing that failure of the supervisors to act upon an application for the laying out of a highway within sixty days after the filing thereof shall be deemed a refusal to lay out the highway), and sec. 1283 (providing that the matter shall not be acted upon again within one year thereafter), the power of the town board is exhausted at the end of the sixty days. *State ex rel. Loehr v. Hanson,* 497

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3. Where an appeal from such a refusal to lay out a highway was not taken within thirty days thereafter, as required by sec. 1276, Stats., the proceedings on the appeal, including an order of the commissioners directing the highway to be laid out, are of no force or effect, and the town board has no authority to proceed in the matter under such order. *Ibid.*

Maintenance. See MUNICIPAL CORPORATIONS, 3.

Law of the road: Collision with automobile: Question for jury. See PLEADING.

4. Where plaintiff, riding southwesterly on a bicycle about four feet from the right-hand curb of a street, was injured in a collision with an automobile which, coming from the northwest on an intersecting avenue, had, in turning to the northeast, cut the corner and come unlawfully upon the left side of the street on which plaintiff was riding, the question of plaintiff's contributory negligence was for the jury, even though his view of the avenue was unobstructed and he knew that vehicles approaching thereon from the northwest had the right of way. *Dunkel v. Smith,* 257

Collision at grade crossing. See RAILROADS, 2, 3.

HOMICIDE.

Evidence: Witness identifying revolver.

1. Upon a trial for murder by shooting with a revolver, it was not error to permit a witness for the state, who testified that he had seen the revolver once before in a city near the place of the shooting, to state further that at that time he and the defendant went to the city together and remained two days alone in her house—such statement having been admitted to show the circumstances under which he saw the weapon, and not having been commented upon in the argument to the jury. *Drinkwater v. State,* 176

Refreshing memory of unwilling witness.

2. It was, in this case, within the discretion of the trial court to permit the prosecuting attorney to refresh the memory of an obviously unwilling witness for the state by calling his attention to what he had said at the coroner's inquest. *Drinkwater v. State,* 176

Expression of opinion by trial judge: Harmless error.

3. In a criminal case the trial judge should refrain from expressing in the presence of the jury his view as to the probative force of the evidence upon any phase of the alleged guilt of the defendant, and should rule upon objections or requests made without comment upon what the evidence shows. *Drinkwater v. State,* 176

4. In this case, however, the refusal to submit to the jury the question of excusable homicide and a statement by the judge to the effect that it was an undisputed fact that defendant was culpably negligent in having a revolver in her pocket and in taking it out and hammering the deceased with it as she testified she did, are *held* not to have been errors affecting any substantial right of defendant or such as should work a reversal, the jury not having found defendant guilty of killing by culpable negligence (manslaughter in the fourth degree, under sec. 4363, Stats.), but having evidently believed that she recklessly and voluntarily fired the shot regardless of the result, and so found her guilty of the higher offense of murder in the second degree under sec. 4339. *Ibid.*

HOTEL. See DEEDS, 2. INNS AND INNKEEPERS.

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HUSBAND AND WIFE.

See DIVORCE, 1, 2, 4. FRAUD, 1–3. GARNISHMENT, 1.

Wife as undisclosed principal of husband: Separate estate: Agency. See BILLS AND NOTES, 3. CONTRACTS, 5. CORPORATIONS, 1, 3.

Testimony of a husband, who had been separated from his wife, that she knew of his borrowing money and giving his notes therefor on several occasions, and that she not only consented thereto but urged and directed him to do so, was insufficient to show that he gave such notes as her agent or to establish her liability as an undisclosed principal, although such borrowings were all connected with a liability originally incurred for farm machinery bought for use both on his farm and on one owned by her, it appearing, among other things, that she did not consider herself liable for the machinery and had refused to sign the notes with him at the time of the first borrowing. *Frailing v. Sieber,* 259

IMMUNITY from process. See CONSTITUTIONAL LAW, 5. STATES.

IMPLIED PROMISE. See MASTER AND SERVANT, 1. REVOCATION OF WILL. WILLS, 1.

IMPROVEMENTS. See PARTITION. TAXATION, 5.

INCOMPETENTS. See CANCELLATION OF INSTRUMENTS, 3.

INDEMNITY. See FRAUDS, STATUTE OF.

INDICTMENT AND INFORMATION. See FALSE PRETENSES, 2, 3.

INDUSTRIAL COMMISSION. See WORKMEN'S COMPENSATION, 14.

INFANTS. See WILLS, 9.

INFERIOR COURTS. See COURTS, 1.

INJUNCTION.

See ATTORNEY GENERAL, 3. SCHOOLS AND SCHOOL DISTRICTS, 4. SPECIFIC PERFORMANCE.

To preserve status quo: Abuse of judicial power. See CORPORATIONS, 11.

1. Where, upon an application for an order preserving the *status quo* pending the final result of an action, the papers show a reasonable probability of plaintiff's ultimate success, it is well nigh an imperative duty of the court to grant such relief, even though there is a direct conflict between the complaint and its supporting affidavits and the answer and affidavits on defendant's behalf. *Dunn v. Acme A. & G. Co.* 128

2. Under the circumstances disclosed in this action for a corporate accounting the *status quo* with respect to certain treasury stock should have been preserved, and an order authorizing the directors to sell such stock without recognizing or protecting plaintiff's right to preserve his proportionate interest in the corporation is *held* an abuse of judicial power. *Ibid.*

INNS AND INNKEEPERS.

Hotel.

A "hotel" is not necessarily a house in which travelers or guests are furnished with food as well as lodging. *Huntley v. Stanchfield,* 119

INOPERATIVE WILL. See WILLS, 4.

INSANE PERSONS. See FRAUD, 1.

INSOLVENCY. See BANKRUPTCY, 1.

INSTALMENT CONTRACT. See SALES, 1, 2.

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INSTRUCTIONS TO JURY.

Harmless error. See FRAUD, 12.

Where, upon the evidence, the jury could have failed to convict the defendant only by wantonly violating their official oaths, alleged errors in the charge to the jury cannot be held prejudicial. *Ryan v. State,* 14

Curing defective verdict. See TRIAL, 4.

Permitting jury to speculate. See PHYSICIANS AND SURGEONS, 2.

INSURANCE.

Validity: Printed policy not conforming to statute. See STATUTES, 2.

1. Where an accident insurance company issued a policy which did not comply with the requirements of clause (6), sub. 2, sec. 1960, Stats., that any portion of the policy "which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold-face type and with greater prominence than any other portion of the text of the policy," no such reduction of the indemnity can be made by the company under a provision of the policy not printed as above stated. The provision not printed as prescribed, although it is a standard provision in the form found under clause (B):—1 of sub. 3 (1), sec. 1960, is, under sub. 9, sec. 1960, to be treated as though it were not in the policy at all. *Williams v. Travelers Ins. Co.* 456

Same: Approval by insurance commissioner: Collateral attack.

2. Where failure in such a case to comply with the statutory requirement appears, without doubt or question, from the policy itself, the fact that the policy form had been approved by the insurance commissioner does not preclude an attack upon it and upon such decision of the commissioner, in an action upon the policy by a beneficiary. *Lundberg v. Interstate B. M. A. Asso.* 162 Wis. 474, limited. *Williams v. Travelers Ins. Co.* 456

Solicitor for insurance company: Imputed knowledge.

3. One who solicits insurance for an insurance company or collects the premiums thereon is by sec. 1977, Stats., made the agent of the company "to all intents and purposes;" hence, when he is doing any act necessary or proper in order to fulfil his agency, his knowledge of the surrounding facts is the knowledge of the company. *Stilp v. New York L. Ins. Co.* 264

Estoppel: Acceptance of initial premium with knowledge of illness of insured: Waiver.

4. An insurance company which receives a premium and delivers a policy with knowledge of the existence of facts rendering the policy void by reason of some stipulation of the policy or application to that effect, is estopped from thereafter insisting upon such stipulation. *Stilp v. New York L. Ins. Co.* 264

5. Thus, a provision in the application for a life policy that the insurance should not take effect unless the first premium was paid and the policy delivered to the insured while he was in good health, could not be insisted upon where the agent cashed the check for the first premium and delivered the receipt therefor after he had learned that the insured was ill and had consulted the company's medical examiner (who was treating the insured as a physician) as to his condition. *Ibid.*

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Same: Accepting premium: Policy not covering obligations under compensation acts: Waiver.

6. In an insurance policy providing for indemnity against loss from the liability imposed by law on account of accidental injuries suffered by employees of the insured in certain places, including the state of Ohio, it was stipulated that "unless specifically indorsed hereon, this policy does not cover any obligation . . . imposed upon the assured by any workmen's compensation . . . law." A workmen's compensation law previously enacted in Ohio went into effect after the policy was issued. The insurer knew and the assured was ignorant of that law, but no deception was charged. *Held,* that the insurer was not estopped to deny its liability in respect to a payment which the insured was obliged to make to an employee under said Ohio law. *Two Rivers D. & D. Co. v. Maryland C. Co.* 96

7. Since the premium paid on said policy at no time included a charge for indemnity against loss imposed by workmen's compensation laws, the retention of the premium by the insurer could not operate to invalidate the stipulation excluding such indemnity. *Ibid.*

8. While a forfeiture of benefits contracted for may be waived, the doctrine of waiver or estoppel cannot be successfully invoked to create a liability for benefits not contracted for at all. *Ibid.*

Action by company against agent for fraud. See PRINCIPAL AND AGENT, 1.

INTENTION. See CONTRACTS, 1. TAXATION, 2.

INTEREST.

Disputed unliquidated accounts: Tender of amount recovered.

In an action upon an open unliquidated account, the amount of which was fairly open to dispute, where the amount for which judgment was recovered had been tendered to plaintiff before the action was commenced plaintiff was not entitled to interest. *Pahl v. Komorowski,* 553

On money paid. See BILLS AND NOTES, 2.

INTERSTATE COMMERCE. See CORPORATIONS, 18. COURTS, 4. MONOPOLIES, 1. TRADING STAMPS, 1.

INTERVENTION. See COSTS, 1, 9. COURTS, 7.

INTOXICATING LIQUORS.

Canvass of votes on license question. See ELECTIONS, 1–3.

Unlawful sale: Evidence. See LIBEL AND SLANDER, 7.

1. Where complaint was made on December 16th that defendant unlawfully sold liquor on the 14th, evidence that a man living seven miles away went to a village on December 14th and secured from a physician a prescription for a pint of whisky, and that he took the prescription to defendant's drug store in the village and there secured the whisky, warranted an inference by the jury that the entire transaction took place on December 14th. *Ryan v. State,* 14

Same: Possession of federal permit.

2. Under sub. 2, sec. 1565*c*, Stats., evidence that at the time in question the defendant had a permit or special tax stamp from the federal government authorizing him to engage in the occupation of selling spirituous or fermented liquors, is *prima facie* evidence of an unlawful sale at that time. *Ryan v. State,* 14

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Action on license bond for sales to minors: Attorney general.

3. Sales of liquor to minors in violation of sec. 1577, Stats., would be a breach of a saloonkeeper's bond, for which, under sec. 1549, an action might be brought in the name of the state; and under sec. 14.53 the attorney general is authorized and may be required to represent the state in such an action. *Hathaway v. Bruggink,* 390

JOINT ACCOUNT. See EVIDENCE, 1.

JOINT WRONGDOERS. See CARRIERS, 8. PHYSICIANS AND SURGEONS, 8. TOWNS, 6.

JUDGE. See OFFICERS, 1.

JUDGMENT. See APPEAL, 5. GARNISHMENT, 2. SALES, 4. SCHOOLS AND SCHOOL DISTRICTS, 4. VENDOR AND PURCHASER, 7.

JUDICIAL NOTICE. See EVIDENCE, 1. MASTER AND SERVANT.

JURISDICTION. See COURTS, 2, 6. NEW TRIAL, 2. TOWNS, 3.

JURY.

See INSTRUCTIONS TO JURY. TRIAL.

Right to trial by jury: Equitable actions.

All issues arising in an equitable action, and especially questions which directly involve the right to equitable relief, are triable by the court, and neither party has a right to have such issues tried by a jury. *Miley v. Heaney,* 58

LACHES. See FRAUD, 9.

LAND CONTRACT. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

See PARTITION. TAXATION.

Construction of lease: Option to extend: Tenancy from year to year.

1. In a farm lease providing that "at the option" of either party "this lease can be extended for one year and at the end of each years least *(sic)* for a period of five years from the date of this lease," the word "option" was not used in its literal sense, since the exercise of such option by one party in one way would nullify its exercise by the other party in a contrary way; and the provision is construed as giving to either party the right or privilege of continuing the lease as therein provided. *Nelson v. Nelson,* 115

2. Under said provision, at the end of the first year either party could extend the lease for either one or four years, and at the end of the second year either party could extend the lease for a period of three years. *Ibid.*

3. Where in such case the lessees held over after the expiration of the first year, their possession must be deemed to have been under the provisions of the lease, and their tenancy was not subject to termination as a tenancy from year to year; and at the end of the second year they were entitled, upon giving proper notice, to extend the lease for three years longer. *Ibid.*

Action to foreclose: When necessary: Improvements by lessee.

4. A lease of parts of a building for a term of sixty years, which gave the lessee "permission" to remodel the premises to fit them for the uses for which they were let, but did not *require* him to make any such changes or in any way indicate the cost thereof, is not such a lease as is contemplated by sec. 2197*a*, Stats., requiring the lessor to pursue an equitable remedy in the nature of a foreclosure action to terminate such a lease as is there described after required im-

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provements costing more than $5,000 have been made by the lessee. *Toy v. Manderin Co.* 596

5. It being manifest from the terms of the lease that the matter of making the changes and the cost thereof were left to the lessee's discretion, it cannot be held that the fact, if it was a fact, that the lessor knew the contemplated remodeling would necessarily cost more than $5,000 brought the lease within the class described in said statute. *Ibid.*

6. A provision in such lease that upon its expiration or in case of a breach of condition by the lessee he would upon request of the lessor place the premises in the condition in which they were at the time of signing the lease, clearly indicates that the parties did not regard the remodeling as an improvement of the premises within the meaning of said sec. 2197*a*, Stats. *Ibid.*

LAW OF THE CASE. See APPEAL, 6.

LAW OF THE ROAD. See AUTOMOBILES, 1–6. HIGHWAYS, 4. PLEADING.

LAYING OUT HIGHWAY. See TOWNS, 3.

LEASE. See LANDLORD AND TENANT, 1–6.

LEGISLATURE. See CONSTITUTIONAL LAW, 2. STATES.

LIBEL AND SLANDER.

Newspaper article reflecting on professional and official capacity.

1. In an action for libel the jury is *held* to have been justified in finding that the newspaper article in question falsely charged, in effect, that plaintiff had committed the crime of assault and battery, that he had not obtained a proper medical education, training, or diploma and that he was a quack doctor practicing as such, and that he was performing his duties as mayor of a city in a ridiculous, foolish, and silly manner and was a subject of ridicule and contempt. *Walters v. Sentinel Co.* 196

2. So far as such article constituted a reflection upon the plaintiff in his professional capacity or accused him of crime it was libelous *per se.* *Ibid.*

Same: Privileged communication: Fair comment on public official: Malice.

3. The gratuitous and unjust reference to plaintiff's professional qualifications and the insinuation that he had committed an assault and battery were not germane to a discussion of his official conduct as mayor and were not privileged. *Walters v. Sentinel Co.* 196

4. A newspaper article which pictured the mayor of a city as performing his duties in a ridiculous, foolish, and silly manner and as a subject of ridicule and contempt, and which, taken as a whole, was not a fair comment upon him in his official capacity, was not conditionally privileged, even though published without malice. *Ibid.*

Same: Privilege of newspaper: Circulation outside of interested constituency.

5. Where a newspaper published primarily for a given constituency, such as county or state, church or lodge, has a small circulation outside of such constituency, it is not deprived of its privilege in the discussion of matters of concern to its constituency because of such incidental outside circulation. *Walters v. Sentinel Co.* 196

6. But where a newspaper published in one city circulates throughout the state and extensively outside of the state, it is not privileged in the discussion of the official conduct of an officer of another city in which its circulation is but an insignificant proportion of the whole,

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the great bulk of its readers having no direct or legitimate interest in such conduct. *Ibid.*

Complaint to public official.

7. A letter to the attorney general stating the writers' belief that the excise laws of the state were being violated in their village by sales of liquor to minors and by the keeping of saloons open on Sundays with accompanying disorders; that no help could be had from the sheriff or the district attorney of the county; and that the writers wished to have something done by the attorney general and to "have the privilege of having peace" in the village, is *held* to be within the rule of qualified privilege, as being a communication calling to the attention of a public official, authorized to take action thereon, an alleged violation of the law. *Hathaway v. Bruggink,* 390

8. The language of the letter in question with reference to the saloons being "open" on Sundays is construed as charging that liquor was sold therein on Sundays. [Whether, in view of what was held in *State v. Wacker,* 71 Wis. 672, the attorney general might, under sec. 3180*a*, Stats., proceed to abate the saloons so violating the Sunday law as being public nuisances under sec. 1563, is not determined.] *Ibid.*

Same: Complaint made maliciously: Reckless statements: Jury question.

9. The letter being only conditionally privileged, an action by the sheriff mentioned therein for libel might be based upon it if, as alleged, the statements therein as to him were made falsely and maliciously; and malice might be proved by showing that such statements were made recklessly or were based on nothing in the way of information. *Hathaway v. Bruggink,* 390

10. It being stated in the letter that the sheriff will do nothing, "being up to his neck in booze most of the time himself," the question whether the words quoted constituted such an unnecessary, irrelevant, and gratuitous charge and insult as not to be within the protection of the rule of qualified privilege might, upon evidence being adduced, become a question for the jury. *Ibid.*

Examination before pleading: Absolute privilege.

11. An absolutely privileged communication, not being a basis for an action of libel, does not give the plaintiff in such an action any right to an examination of the defendants before pleading, under sec. 4096, Stats. *Hathaway v. Bruggink,* 390

12. Upon a motion in such case to restrain a proposed examination of defendants, the question whether the communication was absolutely privileged must be determined by what appears on its face, and anything extrinsic (such as an affidavit by a defendant stating facts and reasons why the communication was written) must be disregarded. *Ibid.*

Same: Conditionally privileged communication.

13. The communication in this case not being absolutely privileged, and it appearing that in the action for libel based thereon there may be issues of fact to be determined by a jury, an examination of the defendants under sec. 4096, Stats., by the plaintiff before pleading, was permissible. *Hathaway v. Bruggink,* 390

Malice: Other published articles.

14. In an action against a newspaper publisher for libel, articles other than the one in question, which appeared in such paper, concerning the plaintiff, are admissible as bearing upon the question of express malice. *Walters v. Sentinel Co.* 196

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Same: Absence of express malice: Harmless error.

15. In an action for libel the admission of testimony bearing only upon the question of express malice was, if error, not prejudicial to defendant, where the jury found that there was no express malice in the publication. *Walters v. Sentinel Co.* 196

Damages. See DAMAGES, 1.

LICENSES. See ELECTIONS, 1–3.

LIEN. See CARRIERS, 9. CORPORATIONS, 1.

LIQUIDATED DAMAGES. See DAMAGES.

LIQUOR LICENSES. See INTOXICATING LIQUORS.

LOGS AND LOGGING. See WORKMEN'S COMPENSATION, 5, 8.

LOOK-AND-LISTEN RULE. See RAILROADS, 1.

MACHINERY. See TAXATION, 1.

MADISON CITY CHARTER. See ELECTIONS, 1–3.

MALICE. See LIBEL AND SLANDER, 1, 9.

MALPRACTICE. See PHYSICIANS AND SURGEONS, 1.

MANAGING OFFICER. See CORPORATIONS, 3.

MANDAMUS.

Motion to quash: Sufficiency of petition or writ: Appealable order.

A motion to quash an alternative writ of *mandamus* is in substance a demurrer raising the question of sufficiency of the facts stated in the petition and alternative writ, and the order granting or denying such motion is appealable. *State ex rel. Standard Oil Co. v. Hull,* 269

MANSLAUGHTER. See HOMICIDE, 4.

MARKETABLE TITLE. See VENDOR AND PURCHASER, 4.

MARRIAGE. See DIVORCE, 4. PARENT AND CHILD, 2.

MARRIED WOMEN. See BILLS AND NOTES, 3. CORPORATIONS, 3. GARNISHMENT, 1. HUSBAND AND WIFE.

MASTER AND SERVANT.

See TOWNS, 2.

Compensation implied: Evidence: Attorneys at law.

1. A promise to pay for services rendered by request will usually be implied from the very fact of the request; but the relations or the circumstances of the parties may be such that no such implication will arise. *Gugel v. Olin,* 321

2. A finding by the jury in this case that the plaintiff, a lawyer, was employed by the defendants, a firm of lawyers, to assist them in a lawsuit in which they were attorneys for plaintiff's brother, with the understanding that defendants were to be personally liable for his services, is *held* not to be supported by the evidence. *Ibid.*

Liability for injury to servant: Failure to furnish safe place to work. See WORKMEN'S COMPENSATION.

3. Where a railway section hand was injured by jumping to the ground (a distance of about fifty-four inches) from the doorway of a box car in which he had been working, a finding by the jury that the injury was caused by the railway company's failure to furnish him a place of employment which was as free from danger as the nature of the employment reasonably permitted was within the jury's province and should not be disturbed. *Van de Zande v. Chicago & N. W. R. Co.* 628

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Same: Failure to warn of danger: Assumption of risk: Pleading.

4. Plaintiff, a section hand, while working in defendant's yard near a wrecking outfit, was injured by a rail which flew backward from a pile of wreckage from which a pair of trucks was being pulled by said outfit. The jury found, upon sufficient evidence, that the defendant railway company did not know, before starting to remove said trucks, that a rail was so located that it might be caught by them, and did not fail to use ordinary care for plaintiff's safety by failing to examine the wreckage to discover the rail which injured him; but it is *held* that the jury did not thereby find that there was no danger in the work which was or could have been known to defendant by the exercise of ordinary care, and that the evidence sustains further findings by the jury to the effect that the defendant failed to use ordinary care for plaintiff's safety by omitting to warn him of the dangers incident to the work, and that such lack of ordinary care was a proximate cause of the injury. *McDougall v. Chicago & N. W. R. Co.* 426

5. The work which plaintiff was doing at the time of the accident being other than his usual work and the first of its kind in his experience, and being under the direction of a vice-principal other than the one in charge of the wrecking crew, his position as to the wrecking operation was different from that of the members of the wrecking crew, and it was within the province of the jury to find, as they did, that there was no assumption of the risk by him. *Ibid.*

6. An allegation in the complaint that "without giving the plaintiff any warning" the defendant negligently operated the derrick of the wrecking outfit so as to cause the trucks mentioned to come in contact with the rail and to hurl it toward the plaintiff, was sufficient, liberally construed, to raise an issue as to defendant's duty to warn plaintiff of the dangers incident to such work. *Ibid.*

Employee or subcontractor. See TRADING STAMPS, 4.

MAXIMS.
Caveat emptor, 374.
De minimis non curat lex, 145.
Equity considers that done which ought to be done, 53.
Res ipsa loquitur, 575, 577, 578.
Res judicata pro veritate accipitur, 165, 168.
Stare decisis, 464.

MERGER. See VENDOR AND PURCHASER, 2.

MILITARY SERVICE. See STATES.

MILWAUKEE CIVIL COURT. See COURTS, 12.

MISREPRESENTATION. See FALSE PRETENSES, 2.

MISTAKE. See AUCTIONS AND AUCTIONEERS, 2. CANCELLATION OF INSTRUMENTS, 1. CONTRACTS, 7. COURTS, 5. DRAINS, 2.

MODIFICATION of contract. See CONTRACTS, 12.

MONEY LENT. See BANKRUPTCY, 1. TRIAL, 4.

MONOPOLIES.

Federal anti-trust act: Protection of producer.

1. In interstate commerce the producer of a commodity is not only entitled, under sec. 1 of the federal anti-trust act (26 U. S. Stats. at Large, 209, ch. 647), to protection against combinations which unreasonably depress the price of his commodity, even though the general public may to some extent benefit by the depression, but is also entitled, under sec. 2 of the act, to protection against combinations which destroy or attempt to destroy the competitive market for his product and compel him to sell it, if at all, to a single

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concern at a price fixed by that concern, *i. e.*, he is entitled to protection against monopoly. *Pulp Wood Co. v. Green Bay P. & F. Co.* 400

Same: Restraint of trade: Pecuniary loss.

2. The "restraint of trade" mentioned in sec. 1 of said act means only unreasonable or undue restraint; but business or trade monopolies are still offensive to the common law, and under sec. 2 of the act, which makes it a misdemeanor for any person or combination of persons to monopolize or attempt to monopolize "any part" of the trade or commerce among the several states, no such monopoly established by private persons of their own motion can be deemed reasonable or lawful. *Pulp Wood Co. v. G. B. P. & F. Co.* 400

3. To bring such a monopoly within the condemnation of the statute it is not necessary to show that pecuniary loss has already resulted either to individuals or to the public; there may in fact have been a temporary benefit. It is sufficient to show that the former competitive market has been destroyed and that it rests within the power of the monopoly to raise or lower prices at will. *Ibid.*

Same: Beneficial results: Legality.

4. A combination between pulp-wood purchasing agencies and a large number of paper manufacturers, which attempted to and did establish a purchasing monopoly and fixed the prices in the spruce pulp-wood market of a large part of the upper peninsula of Michigan, destroying the former competitive market, is *held* to have been unlawful under sec. 2 of said anti-trust statute, even though such combination may have produced beneficial results in increasing and making more steady the supply of pulp wood, in preventing ruinous competition and ruthless sacrifice of natural resources, in enabling the paper makers to make larger contracts for pulp wood and extend their field of supply into Minnesota and Canada, in reducing operating expenses, in making the annual supply sufficient and dependable, and in facilitating the readjustment of freight rates. *Pulp Wood Co. v. Green Bay P. & F. Co.* 400

Contracts essential or convenient to monopoly: Validity.

5. All contracts which formed essential or convenient parts of the machinery of such combination must be held void. Thus, in an action by one of the purchasing agencies against a paper manufacturer for breach of certain provisions of contracts between them by which defendant was to pay, for spruce pulp wood delivered to it, its *pro rata* share of the cost thereof to plaintiff, including expense of operating and interest on the capital used, it is *held* that there can be no recovery for such breach. It being admitted that defendant has paid the reasonable value of the pulp wood delivered to it, the action cannot be considered as one brought to recover the value of goods sold. *Pulp Wood Co. v. Green Bay P. & F. Co.* 400

6. Claims, embraced in such action, based on defendant's breach of provisions in said contracts relating to hemlock pulp wood cannot be severed from the other claims, although no effort is found to have been made by the combination to control the output of hemlock. The inclusion of hemlock pulp wood in its contracts being one of the means found necessary or convenient to accomplish the illegal purpose of the combination, the contracts are void in that respect also. *Ibid.*

MORTGAGES. See FALSE PRETENSES, 2, 3.

MOTIONS. See CERTIORARI. LIBEL AND SLANDER, 12. MANDAMUS. SCHOOLS AND SCHOOL DISTRICTS, 3.

MOTOR VEHICLES. See AUTOMOBILES.

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MUNICIPAL CORPORATIONS.

See TOWNS, 6.

Ordinances: Proof of publication.

1. Courts of this state will not take judicial notice of acts and ordinances of municipalities except upon due proof thereof; and where publication is required proof of publication must be made. *Osceola v. Beyl,* 386

Same: Presumption of publication after thirty-one years.

2. Where, however, a village ordinance, proved to have been regularly passed and recorded, has been in force for thirty-one years, the courts should, in the administration of the law, in the absence of any showing to the contrary, presume that the clerk performed his duty and that the ordinance was published in the manner prescribed by law (sec. 891, R. S. 1878). *Osceola v. Beyl,* 386

Construction of viaduct: Part payment of cost by railroad: Duty of maintenance.

3. The viaduct across the Menominee valley constructed by the city of Milwaukee pursuant to ch. 122, Laws 1891, was understood and intended by the legislature, by the city, and by the defendant railway company, whose tracks crossed Muskego avenue in said valley, to be and it constitutes a new way or street; the vacation by the city, in accordance with sec. 8 of said act, of so much of Muskego avenue as was occupied by the yard tracks and right of way of the defendant—thus relieving defendant of a part of its burden of maintaining crossings over said avenue—was in consideration of the payment by defendant of an agreed sum as part of the cost of the viaduct; and the new street was not in any sense an alteration or a substituted way for said avenue. The railway company was not bound, therefore, under the statutes, the common law, or the city charter, to construct said viaduct, and is not bound to maintain or repair it. *Milwaukee v. Chicago, M. & St. P. R. Co.* 534

Expenditures by city council: Injunction: Taxpayer's action.

4. The expenditure, by direction of a city council, of a small sum in readvertising for bids for the publication of the proceedings of the council, is not such a substantial diversion of public funds as to warrant the interference of a court of equity, by way of injunction, at the suit of a taxpayer. *Mueller v. Eau Claire Co.* 108 Wis. 304, distinguished. *Baumgartner v. Milwaukee,* 641

Council as board of canvassers. See ATTORNEY GENERAL, 3. ELECTIONS, 1–3.

Contract for municipal lighting. See APPEAL, 7. SPECIFIC PERFORMANCE, 1.

Permit or license to telephone company. See TELEGRAPHS AND TELEPHONES, 1.

MURDER. See HOMICIDE.

NEGLIGENCE.

See AUTOMOBILES, 1–3. CARRIERS, 3, 5–7. MASTER AND SERVANT, 3. PHYSICIANS AND SURGEONS, 1. RAILROADS, 1. SCHOOLS AND SCHOOL DISTRICTS, 1. WORKMEN'S COMPENSATION.

Liability for damage caused by escaping gas: Res ipsa loquitur.

In an action for injuries caused by an explosion of gas which had escaped into the basement of a dwelling house there was no evidence

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showing or tending to show that the gas escaped from any pipe or appliance under the control of the defendant gas company or that there was any negligence on defendant's part; and, it appearing that the gas might have escaped from pipes and appliances not under defendant's control, the doctrine of *res ipsa loquitur* does not apply so as to show liability of the defendant. *Quass v. Milwaukee G. L. Co.* 575

Contributory negligence. See AUTOMOBILES, 1, 2. HIGHWAYS, 4. MASTER AND SERVANT, 4. PLEADING. STREET RAILWAYS.

Assumption of risk. See MASTER AND SERVANT, 5.

Concurring negligence. See CARRIERS.

Subsequent or supervening negligence. See PHYSICIANS AND SURGEONS, 8.

By school district in care of school. See SCHOOLS AND SCHOOL DISTRICTS, 1.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEWSPAPERS. See LIBEL AND SLANDER, 1.

NEW TRIAL.

Failure to decide motion within sixty days: Constructive denial: Jurisdiction: Appealable order. See APPEAL, 1.

1. Under sec. 2878, Stats. 1917, the constructive denial of a motion for new trial, resulting from failure to decide such motion within sixty days after the verdict, has the same effect as a formal order of denial; but such an order is not appealable. *Notbohm v. Pallange,* 225

2. Where the sixty days after verdict expired without extension of the time by order and without waiver, a subsequent formal order granting the motion was a nullity, the court having no jurisdiction to grant or to proceed with a new trial, but only to proceed to judgment. *Ibid.*

NONRESIDENT PARTIES. See CONSTITUTIONAL LAW, 12.

NOVATION. See CONTRACTS, 5.

NUISANCE. See LIBEL AND SLANDER, 8.

OBJECTION to title. See VENDOR AND PURCHASER, 4.

OBLIGATION OF CONTRACTS. See CONSTITUTIONAL LAW, 7.

OFFER OF JUDGMENT. See COSTS, 2, 3.

OFFICERS.

De jure: De facto: Payment of salary: Further liability. See ELECTIONS, 1–3.

1. An invalid statute, by its terms, abolished a county court and transferred its powers and functions to a superior court thereby created. A judge of the new court was appointed, who took possession of the records, etc., and entered upon his duties. Plaintiff had for some time been the clerk and phonographic reporter of the county court, but the new judge appointed another person as such reporter of the superior court, and she performed all the duties of reporter and clerk of said court until the statute was declared void. *Held* that, as said judge became the *de facto* judge of the county court (163 Wis. 34), so his appointee became the *de facto*

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clerk and reporter of that court; but that plaintiff remained the *de jure* clerk and reporter. *Clausen v. Fond du Lac County,* 432

2. The county having paid a monthly salary to said *de facto* clerk and reporter in reliance upon the fact that she had possession of the office under color of title and was discharging its duties, cannot be compelled to pay such sums again to plaintiff as the *de jure* officer, but plaintiff may recover from the county the amount by which his lawful salary exceeded the monthly salary so paid to the *de facto* officer, and also the amount of a payment to the *de facto* officer for the last fractional month of her service, such payment having been made after she had ceased to act and the validity of plaintiff's title to the office had been established. *Ibid.*

Liability for ultra vires acts. See TOWNS, 4.

Vacation of office: Incompatible offices. See COURT COMMISSIONERS, 1–3.

Powers. See SCHOOLS AND SCHOOL DISTRICTS, 6, 7.

Attorney general. See ATTORNEY GENERAL.

Trustees of teachers' retirement fund. See SCHOOLS AND SCHOOL DISTRICTS, 7.

City council. See ELECTIONS, 1–3.

Town board. See TOWNS, 3.

OFFSET. See BAILMENTS.

OLEOMARGARINE. See TRADING STAMPS, 1–6.

OPTION to renew lease. See LANDLORD AND TENANT.

OPTOMETRY. See CONSTITUTIONAL LAW, 8–12. CRIMINAL LAW, 1, 2.

ORAL TRUST. See VENDOR AND PURCHASER, 6.

ORDER OF PROOF. See TRIAL, 1.

ORDERS. See APPEAL, 4, 5.

ORDINANCES. See AUTOMOBILES, 4–6. MUNICIPAL CORPORATIONS, 1, 2. PLEADING.

ORIGINAL JURISDICTION. See ATTORNEY GENERAL, 5.

PARENT AND CHILD.

Custody of children: Welfare of child controlling: Fitness of mother. See DIVORCE, 2, 5.

1. The paramount right of the father to the custody of his children, recognized by the common law and by the words of our statute (secs. 3964, 3965, Stats.), has become a mere *prima facie* right. The welfare of the child is now the controlling consideration; and with regard to children of tender years, especially girls, preference will ordinarily be given to the mother, other things being equal and she not being unfit. *Jensen v. Jensen,* 502

Same: Marriage of mother within year of divorce.

2. The fact that, within three months after divorce from the father, the mother of a girl of tender years was, in violation of our divorce statute, in form married to another man in another state and thereafter lived with him as his wife in this state, does not conclusively show depravity of heart or moral unfitness to bring up the child. *Jensen v. Jensen,* 502

3. Where, in such case, the mother claimed, and there was a probability, that she supposed the second marriage would be lawful, and there was no other suggestion of unfitness, the child should not be taken from her care; especially when it appeared that with her the child had a good home and was well taken care of, and that the father

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would probably not be able to give her personal attention but expected to leave her care to grandparents. *Ibid.*

PARTIES. See COSTS, 1. EVIDENCE, 4. TOWNS, 6.

PARTITION.

Rental charge against part owner: Accounting.

In a partition suit for the determination of the respective rights of the parties in a farm and to the proceeds of a sale thereof, a finding by the trial court that one part owner was chargeable with $2,000 as rent for one year during which he had possession of the farm is approved, except that the amount is reduced to $1,600 as being the proper rental charge; an allowance is made to said part owner for improvements and for plowing; an account is stated; and the judgment and order of distribution made by the trial court are modified accordingly. *Werner v. Randall,* 506

PARTNERSHIP.

Construction of agreement: Voluntary dissolution. See CONTRACTS, 4. EVIDENCE, 7.

1. A provision in the partnership agreement of a law firm that "in case of the dissolution of said firm the said N. and J. [members of the firm], or either of them, are to have no interest in the outstanding accounts of said firm," was properly construed to refer to a voluntary dissolution only and not to a dissolution by death of a partner. *Puffer v. Merton,* 366

Death of partner: Attorneys at law: Right of estate to share in compensation for business pending at death of partner. See EXECUTORS, 1, 2.

2. The conducting to a conclusion of business in the hands of a law firm at the time of the death of a partner is not simply a winding up of the partnership, but is a continuation of business after the partnership has ceased to exist; and equity does not require that the estate of the deceased partner, which has contributed nothing toward the work of completing such business, should share in the compensation for such work. *Puffer v. Merton,* 366

3. Upon the death of a partner in a law firm and the purchase by a surviving partner of the tangible property of the estate which had been used in the business, the estate ceased to have any money interest in the business; and there being no contingent-fee cases then in the hands of the firm, but only business held on the usual general retainer basis, the estate was not entitled to any share of the compensation received for work thereafter done. *Ibid.*

PARTY WALLS.

Agreement for party wall: Use by adjoining owner.

1. In an action involving an agreement under which a party wall had been built by defendant's predecessor in title and, if it was thereafter used in the construction of a building by plaintiff, the latter is liable for one half of the cost, the evidence is *held* to show that such wall does not support plaintiff's building or any part of it; that by reason of its structural character it was incapable of being useful in the construction of plaintiff's building and was in fact a hindrance and obstruction; and hence that there was no such use thereof as the agreement contemplated. *Badger State Inv. Co. v. Miller,* 582

2. The fact that, for the mutual protection of the party wall and the adjoining wall of plaintiff's building, plaintiff inserted metal flash-

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ings near the top of the party wall to cause water falling thereon to be shed upon the roof of plaintiff's building, did not constitute a use of the party wall within the meaning of the agreement. *Ibid.*

PAYMENT. See SALES, 1.

PENALTY. See DAMAGES, 2.

PERSONAL INJURIES. See AUTOMOBILES, 1. HIGHWAYS. MASTER AND SERVANT, 3–6. RAILROADS, 1–3. SCHOOLS AND SCHOOL DISTRICTS, 1. STREET RAILWAYS. WORKMEN'S COMPENSATION.

PERSONAL PROPERTY. See BILLS AND NOTES. CARRIERS. CONTRACTS, 5, 6. CORPORATIONS, 1, 2. DIVORCE, 1. GARNISHMENT, 1. REPLEVIN. SALES.

PHYSICIANS AND SURGEONS.

Testimony of physician. See WORKMEN'S COMPENSATION, 12.

Malpractice: Failure to use X-ray: Choosing between two accepted methods of treatment: Negligence.

1. In an action for malpractice a verdict to the effect that the stiffened condition of plaintiff's ankle was caused by failure of defendants to use ordinary care and skill in the treatment of her fractured leg, the bone in which failed to unite properly, is *held* not to be sustained by the evidence. *DeBruine v. Voskuil,* 104
2. Instructions in such case so broad that they permitted the jury to speculate as to the probable cause of plaintiff's injuries are *held* to have been erroneous. *Ibid.*
3. Physicians are not compelled to choose at their peril between two accepted methods of treatment; and the statement of an expert that he would have treated the fracture of plaintiff's leg in a way different from that adopted by defendants was incompetent. *Ibid.*
4. If the treatment adopted was such as physicians or surgeons of ordinary knowledge and skill, of the same school of medicine and practicing in the same vicinity, would have used, the mere fact that a bad result followed is not sufficient to show negligence. *Ibid.*
5. Failure of defendants to make or procure an X-ray examination of the fractured bone is *held* in this case not to have amounted to negligence or unskilful treatment. [Under what circumstances an inference of negligence or unskilful treatment might be drawn from such a failure, is not determined.] *Ibid.*

Injuries due to malpractice of physician regarded as result of original injury: Release to employer: Effect.

6. Enhanced injuries resulting from the negligence or mistaken treatment of a physician employed, in the exercise of ordinary care, to treat an injured person, are generally to be regarded as direct results of the original injury. *Hooyman v. Reeve,* 420
7. A release, executed and delivered to the employer by an injured employee in consideration of the payment of a certain sum, acknowledging full satisfaction "of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from" the accident in question, covered and included a claim for injurious results alleged to have been caused by malpractice of a physician who was employed at the time of the injury to treat said employee. *Ibid.*

[8. Whether in such case the employer and the physician were joint tortfeasors, as that term is ordinarily understood in tort cases, is not decided.] *Ibid.*

Promise to effect a cure. See FRAUD, 1–3.

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PLEADING.

Adverse examination. See LIBEL AND SLANDER, 12.

Sufficiency of complaint. See MASTER AND SERVANT, 6.

Same: Information. See FALSE PRETENSES, 2, 3.

Answer: Sufficiency: Pleading ordinance. See MASTER AND SERVANT, 6.

An allegation in the answer that at the time in question plaintiff, "in violation of the ordinances of the city, . . . neglected to have attached to said milk wagon a lamp or lamps duly lighted and so displayed as to be visible from the rear of such vehicle," and that the "collision was due wholly to the absence of such lights and the violation of the plaintiff of such ordinance," is *held,* though not directly alleging the existence of the ordinance, to have been sufficient to apprise plaintiff of the defense relied upon and to authorize the introduction of the ordinance in evidence. *Yahnke v. Lange,* 512

Demurrer. See ATTORNEY GENERAL, 2. CERTIORARI. MANDAMUS.

Counterclaim. See EXECUTORS, 2. SALES, 1.

PLEDGE. See CORPORATIONS, 2.

POLICE POWER. See CONSTITUTIONAL LAW, 8–12. TRADING STAMPS, 2.

POLICY OF INSURANCE. See INSURANCE, 1.

PRACTICAL CONSTRUCTION. See CONSTITUTIONAL LAW, 1.

PRESUMPTIONS. See CARRIERS, 5. EVIDENCE, 1, 3. INTOXICATING LIQUORS, 2. MUNICIPAL CORPORATIONS, 2. TRIAL, 3. WORKMEN'S COMPENSATION, 5, 16.

PRINCIPAL AND AGENT.

Contract of exclusive agency. See BROKERS.

Husband as agent of his wife. See BILLS AND NOTES, 3. CORPORATIONS, 3. HUSBAND AND WIFE.

Declarations. See EVIDENCE, 5.

Same: Liability on indemnity contract. See FRAUDS, STATUTE OF.

Agent as vice-principal. See MASTER AND SERVANT, 5.

Authority of agent under written instructions. See VENDOR AND PURCHASER, 3.

Ratification of unauthorized acts. See SCHOOLS AND SCHOOL DISTRICTS, 6.

Action by principal for agent's fraud: Special verdict: Insurance. See INSURANCE, 5.

1. In an action by an insurance company for an alleged breach of duty by an agent, the facts (established by the evidence and verdict) that statements in an application for a policy were false; that they were known to be false by defendant, who transmitted the application to plaintiff; that plaintiff believed such statements to be true and relied thereon in issuing the policy, and was justified in so doing; that the false statements exerted a material influence upon the minds of plaintiff's officers so as to induce it to accept the risk and issue the policy; and that plaintiff sustained damages in consequence thereof—constituted a complete cause of action against the defendant. *St. Paul F. & M. Ins. Co. v. Laubenstein,* 451

2. A negative answer in the special verdict to the question whether the false statements exerted a material influence upon the minds of plaintiff's officers so as to induce it to accept the risk and issue the policy, is *held* upon the evidence to have been properly changed to

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an affirmative by the trial court. [Whether that finding was immaterial and whether the statements constituted a warranty by the insured, not decided.] *Ibid.*

PRINCIPAL AND SURETY. See BILLS AND NOTES, 1. CONTRACTS, 16. CORPORATIONS, 1.

PRIVILEGED COMMUNICATIONS. See LIBEL AND SLANDER, 3.

PRIVILEGES AND IMMUNITIES. See CONSTITUTIONAL LAW, 6.

PROBATE OF WILL. See WILLS, 4.

PROXIMATE CAUSE. See RAILROADS, 2.

PUBLIC BUILDINGS. See SCHOOLS AND SCHOOL DISTRICTS, 2.

PUBLIC POLICY. See STATUTES, 2.

PUBLIC RECORDS. See EVIDENCE, 1.

PUBLIC SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC UTILITIES. See APPEAL, 7. SPECIFIC PERFORMANCE, 1.

PUBLICATION of ordinance. See MUNICIPAL CORPORATIONS, 1, 2.

QUALIFIED PRIVILEGE. See LIBEL AND SLANDER, 7.

QUASI-CORPORATIONS. See TOWNS.

RAILROAD COMMISSION. See SPECIFIC PERFORMANCE, 2.

RAILROADS.

As carriers. See CARRIERS, 1–3.

Collision at crossing: Failure to give warning: Slight want of ordinary care: Stop-look-and-listen rule.

1. Under sub. 6, sec. 1809, Stats. 1917,—providing that a recovery for personal injury or death caused by negligent omission of a railroad company to comply with the requirements of that section shall not be barred by a slight want of care on the part of the person injured or killed—there must be a corresponding relaxation of the rigid look-and-listen rule formerly applied to the traveler on a highway at a railroad crossing. *Gordon v. Ill. Cent. R. Co.* 244

2. In an action for fatal injuries to plaintiff's intestate caused by collision between his automobile and defendant's train at a highway crossing, the evidence, showing, among other things, that as the deceased approached the crossing his view of the train was partially obstructed by trees, that the train was running at a high rate of speed, and that the statutory warnings of its approach were not given, is *held* to sustain findings by the jury that the failure to ring the bell and blow the whistle was a proximate cause of the injury and that the deceased was guilty of but a slight want of ordinary care. *Ibid.*

Same: Presumption: Burden of proof.

3. There could be in such case no assumption that the deceased neither looked nor listened for the train; nor, the burden of proving that there was an absolute failure to look and listen being laid by the statute upon the defendant, was the evidence such that the jury was bound to find such absolute failure. *Gordon v. Ill. Cent. R. Co.* 244

Injuries to employee: Negligence. See MASTER AND SERVANT, 3–5.

RATIFICATION. See SCHOOLS AND SCHOOL DISTRICTS, 5. TOWNS, 5. WILLS, 9.

REAL-ESTATE BROKERS. See BROKERS.

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REAL PROPERTY. See CORPORATIONS, 12-25. DEEDS, 2, 3. FALSE PRETENSES, 2. HIGHWAYS, 1-3. INNS AND INNKEEPERS. LANDLORD AND TENANT. MUNICIPAL CORPORATIONS, 3. PARTITION. SCHOOLS AND SCHOOL DISTRICTS, 1-5. TAXATION.

REASSESSMENT. See TAXATION, 7, 8.

REFERENDUM. See ELECTIONS, 1, 3.

REHEARING. See COURTS, 3.

RELEASE. See PHYSICIANS AND SURGEONS, 7.

REMITTITUR. See COURTS, 2.

RENT. See LANDLORD AND TENANT. PARTNERSHIP.

REPLEVIN.

To recover property obtained by fraud. See FRAUD, 1.

Replevin will lie to recover goods—in this case a bank draft—obtained from the plaintiff by fraud. *Roesler v. Shastri,* 153

REPORT of accident. See WORKMEN'S COMPENSATION, 16.

REPUDIATION of contract. See SCHOOLS AND SCHOOL DISTRICTS, 3.

RES ADJUDICATA. See APPEAL, 7.

RESCISSION. See CONTRACTS, 15. CORPORATIONS, 2.

RES IPSA LOQUITUR. See NEGLIGENCE.

RESTRAINT OF TRADE. See MONOPOLIES, 2.

RESTRICTIVE COVENANTS. See DEEDS, 3.

RETIREMENT FUND FOR TEACHERS. See SCHOOLS AND SCHOOL DISTRICTS, 9.

REVOCATION of will. See WILLS, 1.

ROADS AND STREETS. See AUTOMOBILES. HIGHWAYS. MUNICIPAL CORPORATIONS, 3. PLEADING. RAILROADS, 1-3. STREET RAILWAYS. TELEGRAPHS AND TELEPHONES, 1, 2.

RULES OF COURT.

Supreme Court Rules 37, 38 (Motions), 625.

Circuit Court Rule XXIX (Appeals and *certiorari*), sec. 4, 494, 495.

SAFE PLACE TO WORK. See MASTER AND SERVANT, 3.

SALES.

See CONTRACTS, 2, 7, 15. CORPORATIONS, 1-3. FRAUD, 7, 9, 10. HUSBAND AND WIFE.

By auction. See AUCTIONS AND AUCTIONEERS, 1-4.

Validity. See FRAUDS, STATUTE OF.

Successive orders as parts of sale: Refusal to pay for one instalment: Termination of contract.

1. Successive orders for coal given by retail dealers and formally accepted by a wholesaler having been, in the correspondence and accounts of the parties, always considered and treated as being simply items in one continuing transaction, and no contention that they were separate contracts from which separate rights arose having been made at the trial of an action involving a claim of nonpayment and counterclaims of nondelivery, this court, in which that contention is made for the first time on appeal, treats such accepted orders as the parties treated them, not as independent contracts, but as a sale of goods with delivery as well as payment to be made in instalments. *Ambler v. Sinaiko,* 286

2. In such case, under the uniform sales act (sub. 2, sec. 1684*t*—45, Stats.), the failure of the retailers to pay an instalment when due,

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together with their refusal to pay any further instalments until all the coal contracted for had been delivered, although much of it was not yet due to be delivered, justified the wholesaler in refusing to make further deliveries. *Ibid.*

Acceptance on trial: Retention at request of seller.

3. Although at the time of the sale of a gasoline engine it was agreed that the buyer should have thirty days for trial thereof before he need accept it, his retention and use of the engine for a longer period did not constitute an acceptance if the seller urged and induced him to keep and use the engine as long as he did, representing that it would eventually prove satisfactory. *Barta v. Blahnik,* 397

Conditional contract of sale: Judgment for unpaid purchase price: Assignment.

4. Where a conditional contract of sale, providing that title to the goods sold should remain in the vendor until full payment of the purchase price, and a judgment recovered by the vendor upon notes given by the vendee pursuant to said contract, were duly assigned by the vendor and the assignees took immediate possession of a part of the goods in which no interest had been acquired by third persons, the title to the goods so taken vested in the assignees, and a subsequent sale under an execution levied upon such goods as the property of the original vendee was void. *Wiedenbeck-Dobelin Co. v. Anderson,* 212

Same: Election of remedies by seller: Cumulative remedies.

5. The action by the vendor upon notes given by the vendee did not operate to convert the conditional contract into an absolute sale. *Wiedenbeck-Dobelin Co. v. Anderson,* 212

6. The vendor's remedies to enforce payment by action upon said notes and by taking the goods after default in payment of the price were not inconsistent, so as to require an election between them, but were cumulative and might both be pursued. *Ibid.*

SCHOOLS AND SCHOOL DISTRICTS.

Governmental duties: Liability for injury to pupil.

1. Where, in accordance with a custom, a pail containing hot water and chemicals, to be used in cleaning the floor of a school room, was placed by an employee in a passageway before the pupils had left the school building, such act must be deemed to have been done by the school district in the performance of its governmental duties, and the district is not liable for an injury to a pupil who, while passing from one school room to another, fell into such pail. *Juul v. School District,* 111

Same: Maintaining building: Cleaning floors.

2. The word "maintain" in ch. 588, Laws 1913 (amending secs. 2394—48, 2394—49, Stats.), which requires every owner of a public building to "so construct, repair or maintain" it as to render the same safe, relates to acts more closely related to the structure itself of the building than are the operations (such as the placing of the pail in question) involved in keeping the floors clean. *Juul v. School District,* 111

Building of schoolhouse: Repudiation of agreement.

3. Where the sum of $450 was claimed to be due as a balance on a contract for the building of a schoolhouse, a motion, carried at an annual meeting of the school district, "that if we can get out of paying the $450 to [the contractor] we will" was not effectual

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either as a repudiation of the obligation or as a bar to a later recognition thereof. *O'Loughlin v. Dorn,* 205

Same: Judgment restraining tax levy.

4. Where the trial court found that, after a school district had in 1912 adopted a resolution to raise a certain sum for the purpose of paying the balance of the cost of building a schoolhouse, a judgment was entered in the circuit court "restraining the levy of said tax for the reason that it exceeded the amount which could be raised by a tax levy in one year by said district," and said judgment, but no other part of the record in the action in which it was rendered, is in the bill of exceptions upon an appeal in the case in which such finding was made, that finding is conclusive upon this court as to what was determined by said judgment, especially where no exception was taken to the finding. *O'Loughlin v. Dorn,* 205

Same: Ratification of acts of school board.

5. The judgment so found to have been entered could not affect the validity of proceedings based upon formal action taken by the school district in 1915 to approve and ratify the acts of the school board in procuring the erection of the schoolhouse and to authorize the borrowing of money, payable in four annual instalments, to pay the balance of the cost thereof—the action taken in 1915 not being a revival or renewal of the proceedings had in 1912, and hence not a violation of any order restraining the levy of a tax in 1912. *O'Loughlin v. Dorn,* 205

Same: Building costing in excess of fund.

6. Where a school district provided a fund of $1,700 only for the building of a schoolhouse, the school board had no authority or power to bind the district in excess of that amount; but after the board had, without authority, procured the erection of the building at a larger cost, the district, which might in the first instance have provided a fund equal to said cost, could lawfully accept the building and ratify and confirm the acts of the board, and thus create an obligation of the district to pay the larger amount. *Balch v. Beach,* 119 Wis. 77, and *Glidden State Bank v. School Dist.* 143 Wis. 617, distinguished. *O'Loughlin v. Dorn,* 205

Teachers' retirement fund: Powers of board.

7. The limits of and the limitations upon the rights of those claiming benefits under the teachers' retirement act (ch. 42, Stats.) are fixed by that statute, and the board intrusted with the management of the fund thereby created, while it may, under sec. 42.03, reasonably regulate the manner in which and the forms by which such rights may be obtained, cannot restrict or enlarge the rights given by the statute, nor can it lessen or add to the number of those entitled to such benefits. *State ex rel. Murphy v. Trustees, etc.* 238

Same: "Teacher" defined.

8. Thus, the statute (in sec. 42.11) having given to "any teacher who may be teaching" in the public schools of this state the right to an annuity after a certain period or periods of service, to be computed as therein provided, and having (in sec. 42.17) defined the term "teacher" as including "all persons legally employed in teaching in the public schools . . . outside of cities of the first class, and all persons legally or officially employed or engaged in superintending, supervising or inspecting such public schools," the board had no power, especially after an application for an annuity had been made by a person coming within said definition and who had otherwise met the statutory requirements, to exclude such applicant by the adoption of a rule that "no credit is given for teaching in our

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public schools, unless the teacher is regularly employed for at least half-day work." *State ex rel. Murphy v. Trustees, etc.* 238

Same: Mistake as to assessments: Deficiency: Effect on annuity.

9. The retirement fund having, under the statute, other sources for its creation and support, the fact that the contributions made to the fund by an applicant for an annuity had for several years been less than the proper amount, due to an error in computation by the city clerk, did not affect her right to have such annuity granted upon the condition that she first pay into the fund the amount required by law (secs. 42.08, 42.11) to make up any deficiency in the total amount paid. *State ex rel. Murphy v. Trustees, etc.* 238

SEPARATE CONTRACT. See SALES, 1.

SEPARATE MAINTENANCE. See DIVORCE, 1.

SERVICE OF PROCESS. See STATES.

SHERIFF. See LIBEL AND SLANDER, 7.

SLIGHT WANT OF ORDINARY CARE. See RAILROADS, 1.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT. See CONSTITUTIONAL LAW, 5. STATES.

SPECIAL VERDICT. See TRIAL, 5.

SPECIFIC PERFORMANCE.

Contracts enforceable: Municipal lighting.

1. A contract with a city to do municipal lighting may be specifically enforced where it has a distinctive and peculiar value other than a pecuniary one and where a remedy by way of damages for its breach would be inadequate. *Oconto E. Co. v. Oconto S. Co.* 165

Same: Stipulation as a contract: Equitable estoppel: Injunction.

2. A stipulation between rival lighting companies, made in a proceeding before, and at the suggestion of, the railroad commission, providing, among other things, that if it should be determined (in pending or proposed litigation) that one of said companies was entitled to do certain municipal lighting it might for a time use the equipment of the other company for that purpose, was in the nature of a contract and enforceable as such. *Oconto E. Co. v. Oconto S. Co.* 165

3. In view of the material change in plaintiff's former status, induced by the conduct of the city and the defendant company connected with said stipulation, and the expense and delay occasioned by plaintiff's prosecution of the former action in reliance thereon, the court should intervene, on the ground of equitable estoppel, to restrain the city from breaching the contract with plaintiff and to enforce specific performance of it and of the stipulation. *Ibid.*

4. Injunction is a proper remedy, in such a case, to enforce plaintiff's rights and prevent irreparable injury. *Ibid.*

STATES.

Public records: Boundaries. See EVIDENCE, 1.

Acts of Congress: Conflict with state laws. See CONSTITUTIONAL LAW, 2.

Under its powers, expressly granted, relative to the army and navy, Congress may prescribe the conditions under which persons in the military service of the United States shall be subject to the process of courts, whether state or federal. So, also, a state may confer upon such persons certain privileges and immunities respecting the

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process of its courts. But when Congress has spoken fully on the subject, the federal statute supersedes that of the state in case of any conflict or difference between them. *Konkel v. State,* 335

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW, 3, 6, 7.

Construction. See BILLS AND NOTES, 3. BRIDGES. CARRIERS, 1. CONSTITUTIONAL LAW, 4, 8, 12, 13, 16, 19–21. ELECTIONS, 1–3. FALSE PRETENSES, 5. INSURANCE, 1. MUNICIPAL CORPORATIONS, 3. OFFICERS, 1. RAILROADS. SALES, 2. SCHOOLS AND SCHOOL DISTRICTS, 7, 8. TAXATION, 2, 4, 7, 10. TOWNS, 2. TRADING STAMPS, 1, 3–6. TELEGRAPHS AND TELEPHONES, 2. VENDOR AND PURCHASER, 5. WORKMEN'S COMPENSATION, 2, 15.

Construction of amending statute: Repeated language.

1. By the repetition of language in an amending statute which provides that the original section shall be "amended to read as follows," such repeated language is not repealed and re-enacted, but remains in force as of the time of the original enactment, in the absence of a clearly expressed legislative intent to the contrary. *Wis. Trust Co. v. Munday,* 31

Statute prescribing form of contract: Effect.

2. When a statute declares, as the public policy of the state, that contracts relating to a particular subject (in this case insurance against accidents) shall be in certain prescribed forms and with specific conditions concerning the respective rights and duties of the parties, such statute is controlling as against any contract the parties may attempt to make varying therefrom. *Williams v. Travelers Ins. Co.* 456

STAY of proceedings. See CONSTITUTIONAL LAW, 4.

STIPULATIONS. See DRAINS, 3. SPECIFIC PERFORMANCE, 2.

STOCKHOLDERS. See CORPORATIONS, 4, 8, 11.

STREET RAILWAYS.

Injury to workman near tracks: Contributory negligence.

A laborer employed in the laying of a cement sidewalk, while engaged in wheeling concrete from a mixer placed in front of the premises and near street railway tracks, was injured, as he stood between the handles of his wheelbarrow near the mixer, by a street car which struck such handles. He had been working at this job for three days and knew that cars passed frequently. Nothing had occurred at the time of the accident to divert his attention and, his view being unobstructed, if he had kept a proper lookout as he proceeded from the curb to where he stood he would have seen the car approaching. *Held,* that he was guilty of contributory negligence precluding a recovery. *Yellick v. Milwaukee N. R. Co.* 562

STREETS. See AUTOMOBILES. BRIDGES. HIGHWAYS. MUNICIPAL CORPORATIONS, 3. TELEGRAPHS AND TELEPHONES, 1.

SUBROGATION. See CORPORATIONS, 5.

SUICIDE. See WORKMEN'S COMPENSATION, 5.

SUNDAY WORK. See WORKMEN'S COMPENSATION, 10.

SUPREME COURT. See APPEAL AND ERROR. COURTS, 1.

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TAXATION.

Restraining tax levy. See SCHOOLS AND SCHOOL DISTRICTS, 4.

Machinery as real property: Intent.

1. Machinery adapted to the purposes of a manufacturing plant becomes, when installed therein and connected with the building by wires or belts, a part of the freehold, and the land, buildings, and machinery so attached constitute an entity and pass by deed, mortgage, or other conveyance of the land. *State ex rel. Gisholt M. Co. v. Norsman,* 442

2. The machinery in a machine-tool factory ranged from very small machines to those weighing thirty to forty thousand pounds, all being adapted to the purposes of the plant. For the most part they were held in position by their own weight and were neither bolted nor screwed to the floor, but were all attached either to electric motors by wires or to the steam power plant by belts and pulleys. Any part of the solid concrete floors was of sufficient strength to support the weight of the heaviest machine; and the machines were occasionally moved from place to place in the factory to suit the varying convenience and necessities of the plant. *Held,* that they were fixtures and were properly assessed for taxation as part of the realty, under sec. 1035, Stats. *Ibid.*

3. Although the question of whether property constitutes fixtures is largely one of intent, yet where the property is adapted to the use to which the realty is devoted its use in such manner is such strong evidence of intent to make it a part of the freehold as not to be overcome by the fact that it was carried on the books of the owner as movable equipment. *Ibid.*

Assessment of property: Front-foot method: Information considered by assessor.

4. In valuing real property for taxation the assessor started several blocks from the manufacturing plant in question, towards the business section of the city, placed a front-foot value on the lots at this point, and then reduced the front-foot valuation by blocks as he proceeded toward the plant. He also considered the fact that certain blocks had sidetrack facilities, and gave due regard to the actual value of land as reflected by sales in the vicinity, and to the sworn testimony of presumably competent persons on other occasions as to real-estate values in that part of the city. *Held,* that the valuation so arrived at was not governed by an arbitrary rule and was in compliance with the requirement of sec. 1052, Stats., that "real property shall be valued by the assessor from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale." *State ex rel. Gisholt M. Co. v. Norsman,* 442

Same: Land and improvements: Valuation.

5. Under sec. 1052, Stats., the assessor should value separately the land and the buildings and arrive at the total valuation by adding the two items together. He should not find first the value of the land and improvements as a whole and then apportion such total value between land and improvements. *State ex rel. Gisholt M. Co. v. Norsman,* 442

Same: Value of factory and machinery: Cost less depreciation.

6. In valuing factory buildings and machinery constituting fixtures therein, the original cost less depreciation was a sufficient basis for the formation of an honest judgment and, no better method being suggested, and no reason appearing why such original cost should be further discounted to arrive at the actual cash value or the

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value that might reasonably be expected to be obtained for the property at private sale, an assessment on that basis was a compliance with sec. 1052, Stats. *State ex rel. Gisholt M. Co. v. Norsman,* 442

Reassessment: By tax commission: Current assessment. See TOWNS, 2.

7. The authority of the tax commission, under secs. 1087—45, 1087—51, 1087—57, Stats., to order a reassessment may be exercised in the case of a current assessment, even though the tax roll has been delivered to the treasurer for collection. *State ex rel. South Range v. Tax Comm.* 253

[8. Whether it would be an abuse of discretion to order a reassessment, under said statutes, where one or more assessments had intervened, is not decided.] *Ibid.*

Same: Custody of records: Duty of town clerk.

9. Under sec. 1087—46, Stats., providing that the persons appointed by the tax commission to make a reassessment in a district shall, while engaged therein, "be entitled to have custody and possession of the roll containing the original assessment," it is the duty of the town clerk having possession of such roll, and he is required, to deliver it, upon demand, to the persons so appointed, and his wilful neglect or refusal to do so subjects him to the penalty prescribed in sec. 1087—56. *State v. Erickson,* 600

Income tax: Educational corporation: Income used in improving property.

10. Where an educational corporation organized to conduct a private enterprise on the plan of a profit-sharing corporation, with capital stock owned by shareholders, receives from its business an annual income in excess of its expenses and applies the excess to improving its properties, thus enhancing the value of the holdings of the stockholders, its income is not exempt from taxation under sub. 2, sec. 1087*m*—5, Stats. *St. John's Military Academy v. Larson,* 357

TAX COMMISSION. See TAXATION, 7, 8. TOWNS, 2.

TAXPAYER'S ACTION. See MUNICIPAL CORPORATIONS, 4.

TAX ROLL. See TOWNS, 2.

TEACHERS. See SCHOOLS AND SCHOOL DISTRICTS, 7, 9.

TELEGRAPHS AND TELEPHONES.

Trimming trees without owner's consent: Damages.

1. The owner of land in a street or of land abutting the street is entitled to compensation for injuries to his shade trees in the street occasioned by their being trimmed without his consent by a telephone company; and no license from the city to maintain the telephone system can give the right to do such trimming. *Hurlbut v. Union Tel. Co.* 125

2. Under sub. 6, sec. 1778, Stats., if there have been no condemnation proceedings, a telephone company which destroys, trims, or otherwise injures shade trees along its line without the owner's consent is liable to the owner for treble damages. *Ibid.*

TEMPORARY RESTRAINING ORDER. See APPEAL, 2.

TENANCY FROM YEAR TO YEAR. See LANDLORD AND TENANT, 3.

TENDER. See INTEREST.

TITLE.

To land. See CANCELLATION OF INSTRUMENTS. CORPORATIONS, 16–25. DEEDS, 1–3. FALSE PRETENSES, 2. PARTY WALLS. PARTITION. TAXATION.

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TITLE—con.
To personal property. See CONTRACTS, 5, 6, CORPORATIONS, 1, 2. FRAUD. GARNISHMENT. HUSBAND AND WIFE. PARTNERSHIP. REPLEVIN. SALES, 3–6.
TORTS. See AUTOMOBILES. BANKRUPTCY. CARRIERS, 3, 4. FRAUD. LIBEL AND SLANDER. MASTER AND SERVANT. NEGLIGENCE. PHYSICIANS AND SURGEONS. PRINCIPAL AND AGENT. RAILROADS, 1, 3. TELEGRAPHS AND TELEPHONES, 2. TOWNS, 3–6.
TOWN CLERK. See TOWNS, 2.

TOWNS.

See SCHOOLS AND SCHOOL DISTRICTS, 6.

Powers and functions.

1. A town is a mere *quasi*-corporation, possessing only such powers and functions and subject only to such liabilities as are provided by statute. It must function in the manner prescribed by the legislature, and courts can sanction no other. *Mulvaney v. Armstrong,* 476

Officers: Duty of clerk to make tax roll: Town board cannot hire work done. See TAXATION, 9.

2. It is the duty of the town clerk to make out the tax roll of the town; and prior to the enactment of sec. 1084*a*, Stats. (ch. 274, Laws 1917), a town board had no authority to employ another person to perform that duty, even though, by reason of orders of the tax commission requiring reassessments of the property of the town for previous years, the work of making out the roll became so complicated and difficult that neither the clerk nor any other qualified elector of the town was capable of doing it in the manner required by sec. 1087—57, Stats. *Mulvaney v. Armstrong,* 476

Same: Dissipation of power of town board by adjournments. See HIGHWAYS, 1–3.

3. The court expressly withholds assent to the proposition that an administrative body charged with *quasi*-judicial duties—in this case a town board, in the matter of laying out a highway—can dissipate its power, and deprive the public of the benefit of its exercise, by adjourning for a longer period than is allowed by statute, by failing to give the required notice of adjournment, or by not making award of damages within the statutory time. *State ex rel. Loehr v. Hanson,* 497

Recovery of moneys unlawfully spent by town board: Estoppel: Joint wrongdoers: Contribution.

4. Where, because it was not a proceeding under ch. 54, Stats., a resolution adopted at a town meeting, purporting to establish a drainage system and authorize the town board to fix and lay out districts in the town, did not confer any lawful authority upon the town officers, town moneys expended by them in procuring a survey and laying out of a system of drainage ditches may be recovered in an action by the town against them. *Humboldt v. Schoen,* 414

5. The acts of the town officers having been *ultra vires,* the town is not estopped from recovering the moneys so unlawfully expended by them, either by the fact that the electors adopted said resolution, by their ratification and approval of the acts of the officers in relation thereto, or by their subsequent formal authorization of the expenditure of town funds to defray expenses incurred in carrying out the project. *Ibid.*

6. The action to recover the moneys so unlawfully expended may be

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brought by the town against any one or more of the officers who participated in the illegal act, and those sued have no right to have their joint wrongdoers made parties defendant. If any right to contribution arises in favor of those against whom a recovery is had, it must be pursued in a separate action. *Ibid.*

TRADING STAMPS.

State regulation: Oleomargarine: Interstate commerce: Police power.

1. The shipment, by a manufacturer located in another state, to jobbers within this state, of oleomargarine wrapped and packed for shipment in accordance with the requirements of the federal law, the placing in each box so packed of a "dealer's coupon" entitling the person or jobber to whom such original shipment is made to receive in cash an amount dependent upon the number of pounds of oleomargarine in the box, and any redemption of such coupons, either by the manufacturer or by any third person whom it may designate, are all parts of one transaction of interstate commerce, which is subject only to federal regulation and hence is not governed by sec. 1747*m*, Stats. 1917 (ch. 480, Laws 1917). *State ex rel. Downey-Farrell Co. v. Weigle,* 19
2. There is in such case no right of the state to inspect or regulate said article of commerce in order to protect the health or morals of its citizens, and no other feature which might bring it within the reasonable exercise of the police power of the state to prevent fraud. *Ibid.*
3. The final clause in sub. 1, sec. 1747*m*, Stats. 1917 (providing that any manufacturer, packer, or dealer may "issue," with the sale of any goods, a slip, ticket, or check which shall bear upon its face a stated cash value and shall be redeemable only in cash "and only by the person, firm, or corporation issuing the same"), permits any manufacturer, packer, or dealer, whether within or without the state, to place so-called "clerk's" or "consumer's" coupons, redeemable in cash only and by the person so issuing them, within any original carton, package, or box intended for original shipment, although such original packages are not sold by him to the ultimate consumer. *Ibid.*
4. It is not necessary that the redemption of such cash coupons shall be by someone within this state; but a provision in the coupons that they shall not be sent to the corporation issuing them but shall be redeemed only by another corporation, which is engaged in the trading-stamp business and must be regarded more as an independent contractor than as an agent, servant, or employee of the issuing corporation, is in violation of the statute. *Ibid.*
5. The requirement that each coupon shall bear on its face a "stated cash value" should be reasonably construed, and is sufficiently complied with where a definite cash value is stated on the face of the coupon, although on the back there is the further statement, signed by the issuing corporation, that it is redeemable only by another corporation "as our agent according to terms of its catalog in effect at time of redemption, except that in any state or locality where redemption in goods is prohibited or requires payment of license or tax, not required for cash redemption, this coupon will be redeemed in cash only, and is void wherever prohibited." *Ibid.*
6. There is also a sufficient compliance with said requirement as to a "stated cash value," where, with no purpose to deceive and as a matter of convenience only, the coupon states the amount of the sale and indicates that the cash value of the coupon itself is a certain percentage of that amount. *Ibid.*

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TRANSACTIONS WITH DECEASED PERSON. See EVIDENCE, 7.
TREASURY STOCK. See CORPORATIONS, 7.
TREBLE DAMAGES. See TELEGRAPHS AND TELEPHONES, 2.
TREES. See TELEGRAPHS AND TELEPHONES, 1, 2.
TRESPASS. See TELEGRAPHS AND TELEPHONES, 1.

TRIAL.

Place of trial. See VENUE.
Conduct of judge. See HOMICIDE, 3.
Manifest clerical error: Disregard. See VENUE.
Relief from mistake. See COURTS, 5.
Permission to answer. See COURTS, 6.
Judgment on failure to answer in garnishment. See GARNISHMENT, 1.
Order of proof: Examination of witnesses: Discretion of court. See EVIDENCE, 1.

1. The order in which witnesses shall be examined and cross-examined, the form of questions, and the manner in which the trial of a case shall be conducted, are matters largely within the discretion of the trial court. *St. Paul F. & M. Ins. Co. v. Laubenstein,* 451

Refreshing memory of unwilling witness. See HOMICIDE, 2.
Questions for jury. See AUTOMOBILES, 1, 2. BANKRUPTCY, 1. CONTRACTS, 4. EVIDENCE, 6. FRAUD, 1. HIGHWAYS, 4. HOMICIDE, 4. MASTER AND SERVANT, 3, 5. RAILROADS, 3. STREET RAILWAYS.
Instructions to jury. See INSTRUCTIONS TO JURY.
Verdict: Based on conjecture.

2. A verdict based on mere conjecture cannot stand. *Quass v. Milwaukee G. L. Co.* 575

Effect of uncontradicted testimony. See EVIDENCE, 6.
Direction of verdict. See ATTORNEY AND CLIENT.
Special verdict: Separation of questions: Instructions.

3. A finding by the jury to the effect (1) that the money represented by a check sent by the defendant to, and payable to the order of, the president and manager of a grain company, was in fact loaned to that company, although the only written obligation given on account thereof was the individual note of the vice-president of the company, and (2) that the presumption that said note was received by defendant as payment of the money advanced was rebutted and overcome,—is *held* to be sustained by the evidence. *Brittan v. Buerger C. Co.* 590

4. Although, perhaps, it would have been better had the two questions above indicated been submitted to the jury separately, yet under the instructions given the one question which was submitted, *i. e.* as to whether the money was a loan to the grain company, sufficiently covered both propositions. *Ibid.*

Same: Changing answers by court. See AUTOMOBILES, 2. CONTRACTS, 4. PRINCIPAL AND AGENT, 2.
Same: Finding by court on issue submitted to jury.

5. It is not error for the trial court to refuse to make a finding upon an issue sufficiently covered by the questions submitted for a special verdict. *St. Paul F. & M. Ins. Co. v. Laubenstein,* 451

Trial by court. See INJUNCTION, 1, 2. JURY, 1. VENDOR AND PURCHASER, 7.
Reduction of damages. See DAMAGES, 1.

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TRIAL—con.
Preserving exceptions. See APPEAL, 8.
New trial. See NEW TRIAL.
Termination. See BAILMENTS.
TRUSTEE in bankruptcy. See BANKRUPTCY, 2.
TRUSTS AND TRUSTEES. See CANCELLATION OF INSTRUMENTS, 3. WILLS, 5–9.
ULTIMATE CONSUMER. See TRADING STAMPS, 3.
ULTRA VIRES. See TOWNS, 5.
UNDUE INFLUENCE. See DEEDS, 1.
USAGE AND CUSTOM. See CARRIERS, 9, 10.
USE OF X-RAY. See PHYSICIANS AND SURGEONS, 5.
VACATION OF STREETS. See MUNICIPAL CORPORATIONS, 13.
VALIDATION OF DEEDS. See CORPORATIONS, 19.
VALUE. See EVIDENCE, 3. FRAUD, 4.

VENDOR AND PURCHASER.

See BROKERS. FRAUD, 5.

Contradicting deed and contract by parol: Assumption of mortgage: Merger of contract in deed.

1. By a written contract, unambiguous and complete in itself, a land company agreed to convey to one C. certain land in consideration of his deeding to it certain other land "subject to mortgages amounting to" a certain sum, and the subsequent deed from C. to the company recited that it was "subject to the following mortgages," naming them; but neither in the contract nor the deed did the company assume and agree to pay the mortgages. *Held*, that the terms upon which the company agreed to part with its land and the terms upon which it was to receive the land of C. were contractual terms, and that parol testimony was not admissible to show that the consideration actually agreed upon included the assumption and payment of the mortgages by the company. *Borchert v. Skidmore L. Co.* 523

2. The provision as to consideration in the contract did not merge in the deed so that, as a mere recital in the deed, it could be contradicted by oral testimony. *Ibid.*

Same: Authority of agent to vary terms of contract.

3. A finding by the trial court that an agent of the land company, who acted for it under written instructions in the matter of the execution of the conveyances, and who, it was claimed, at that time orally agreed on behalf of the company to assume and pay the mortgages, had no authority to vary the terms of the original written contract, is *held* to be supported by the evidence. *Borchert v. Skidmore L. Co.* 523

Title of vendor: Objection must raise reasonable doubt.

4. Objections to the title to be conveyed under an obligation to give a good or marketable title must raise at least a reasonable doubt as to the validity of the title upon a question of law or fact. *Andrews v. Fluekiger,* 348

Same: Cloud on title: Recording instrument disparaging grantor's title.

5. Some years after a land contract to defendants had been executed by the holder of the legal title (Mrs. C.) and her sister (the plaintiff), who held a mortgage on the land, Mrs. C. conveyed the land to

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plaintiff subject to said contract. Thereafter a daughter of Mrs. C., by a written contract reciting that such conveyance was made by Mrs. C. without consideration and while she was incompetent and under duress, employed attorneys to have it set aside; and this contract, and also a conveyance by the daughter to the attorneys of an interest in the land, were recorded. In an action by plaintiff to foreclose the land contract it was conceded that at the time of its execution Mrs. C. was competent to contract, and the court found that there was no evidence of her subsequent incompetency or that her conveyance to plaintiff was not her free and voluntary act. *Held*, that the claims asserted by the daughter and her attorneys did not constitute any cloud upon or imperfection in the title which the defendants would receive under a conveyance to them pursuant to the land contract, and hence did not constitute a defense to the action. *Andrews v. Fluekiger*, 348

Same: Oral understanding between grantor and third person.

6. No oral understanding at the time Mrs. C. conveyed the land to plaintiff that whatever might be left of the property after plaintiff had cared for Mrs. C. until her death should be transferred to Mrs. C.'s daughter could create any rights which might be asserted hostile or superior to those given the defendants by the land contract. [Whether, in view of sec. 2302, Stats., such an oral trust could be recognized or enforced at all, is not decided.] *Andrews v. Fluekiger*, 348

Judgment on foreclosure: Directions as to persons who should sign deed.

7. A direction by the court in the foreclosure action that both the plaintiff and Mrs. C. should join in a warranty deed to be delivered to defendants upon payment of the purchase price, was proper and within the province of the court. *Andrews v. Fluekiger*, 348

VENUE.

Manifest error in entitling action.

A manifest clerical error in entitling an action as one in M. county circuit court instead of one in W. county circuit court was properly disregarded by the latter court. *St. John's Military Academy v. Larson*, 357

Action of purely local concern. See ATTORNEY GENERAL, 5.

VERDICT. See PHYSICIANS AND SURGEONS, 1. TRIAL.

VIADUCT. See MUNICIPAL CORPORATIONS, 3.

VICE-PRINCIPAL. See MASTER AND SERVANT, 4.

VILLAGES. See EVIDENCE, 1.

WAIVER.
Of lien by carrier. See CARRIERS, 9, 10.
Of contract requirements. See CONTRACTS, 13, 14.
Of time of performance. See DRAINS, 3.
Of architect's certificate. See CONTRACTS, 16.

WARRANTY. See PRINCIPAL AND AGENT, 2.

WAY. See MUNICIPAL CORPORATIONS, 3.

WILLS.

Implied revocation: Death of all beneficiaries.

1. Where all the beneficiaries named in a will, none of whom was related to the testator, died during his lifetime, the will was impliedly revoked and became inoperative. *Estate of Judson*, 361

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Same: Bequest to persons and "heirs and assigns:" Words of limitation.

2. Where by such will property was given to persons named "and to their heirs and assigns," the latter words were merely words of limitation, descriptive of the nature of the estate given; and no estate passed to such heirs or assigns. *Estate of Judson,* 361

Construction: Evidence to show meaning contrary to will.

3. The language of the will being plain and certain in meaning, testimony to show that the testator intended that in case of the death of the beneficiaries the property should go to their heirs was not admissible. *Estate of Judson,* 361

Agreement to withdraw objections to probate. See CANCELLATION OF INSTRUMENTS, 1, 2.

Refusal of probate of inoperative will: Harmless error.

4. There was in such case no material error or irregularity in denying probate to the will when it was first presented, rather than admitting it to probate and afterwards holding it inoperative because there were no beneficiaries who would take under it. *Estate of Judson,* 361

Same: Refusal of probate on admissions of interested parties: Jurisdiction of court: Agreement to create trust different from will.

5. Objection to the probate of a proposed will having been duly made in county court on the ground of mental incapacity of the decedent, and the issue thus made having been tried upon the evidence and the admissions of all persons interested that the objection was well founded, the court had jurisdiction to deny probate to the alleged will and to administer the estate as intestate, although said admissions were made pursuant to an agreement made out of court by the interested parties for the creation of a trust as to the property of the decedent, and although, if the will were valid, such trust agreement would be void. *First Trust Co. v. Holden,* 1

Appointment and discharge of administrator.

6. An order of the county court in such case appointing as administrator a trust company to which the decedent's property had been conveyed pursuant to said trust agreement, and a subsequent order discharging such company as administrator, made after due examination of its accounts and a finding that, as administrator, it had no property of the estate in its possession, were within the jurisdiction of the court and were valid and effective, even though such orders were made in recognition of the fact that the property had been conveyed to the trust company as trustee and were intended to give sanction to the trust agreement as a proper and valid disposition of the estate and, for that reason, the court did not decree a distribution of the estate under the law governing intestacy. *First Trust Co. v. Holden,* 1

7. The sole heir having become the owner of decedent's property at the time of his death, subsequent proceedings in the county court to transfer any possible interest which unborn children of said heir might have had in the estate under the alleged will had no legal efficacy. *Ibid.*

8. The fact that the trust agreement above mentioned was executed before the alleged will was denied probate does not affect the validity of the trust evidenced by said agreement or of the trust deed made pursuant thereto, if they are otherwise valid. *Ibid.*

Execution of trust agreement by minor: Ratification.

9. Although said trust agreement and deed were executed by the sole

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heir of the decedent, and by her general guardians, while she was still a minor, yet the terms of the trust so created being unobjectionable in law, and the execution of said instruments not having been induced by fraud, and said heir, after attaining her majority and after full investigation of the trust and its administration and with full knowledge of all the facts, having executed an express written ratification of the trust agreement and deed, they are valid and binding upon her. *First Trust Co. v. Holden,* 1

WINDING UP OF PARTNERSHIP. See PARTNERSHIP.

WITNESSES.

See EVIDENCE, 7. TRIAL, 1.

Competency: Transactions with decedents.

The widow of a deceased partner was competent to identify the signature of her husband, and her testimony in that respect did not involve any "transaction or communication" with the deceased, within the purview of sec. 4069, Stats. *Jones v. Citizens' S. & T. Co.* 646

WORDS AND PHRASES.

Actual view, in statute. See TAXATION, 4.
Adverse party, in statute. See WORKMEN'S COMPENSATION, 17.
Amended to read, in statute. See STATUTES, 1.
Any part, in statute. See MONOPOLIES, 2.
Arising, or to arise from, in release. See PHYSICIANS AND SURGEONS, 7.
At the option, in lease. See LANDLORD AND TENANT, 1.
Before the passage, in statute. See CORPORATIONS, 20.
Bill of lading, in statute. See CARRIERS, 1.
Bold-face type, in statute. See INSURANCE, 1.
Canvassing board, in city charter. See ELECTIONS, 1.
Capital stock, in statute. See CORPORATIONS, 13.
Confidence game, in statute. See FALSE PRETENSES, 6.
Construct, repair, or maintain, in statute. See SCHOOLS AND SCHOOL DISTRICTS, 2.
Corporations not organized or conducted for profit. See CORPORATIONS, 20.
Custody and possession, in statute. See TAXATION, 9.
Direct or indirect, in release. See PHYSICIANS AND SURGEONS, 7.
Dissolution, in contract. See PARTNERSHIP, 1.
Educational corporation, in statute. See TAXATION, 10.
Exclusive sale, in contract. See BROKERS.
Fixtures, in statute. See TAXATION, 2.
Fraudulent transfer, in statute. See BANKRUPTCY, 1.
Heirs and assigns, in will. See WILLS, 2.
Hotel, in deed. See DEEDS, 2. INNS AND INNKEEPERS.
Improvements, in statute. See LANDLORD AND TENANT, 6.
Indorser, in statute. See BILLS AND NOTES, 3.
Issue, in statute. See TRADING STAMPS, 3.
Liquidated damages, in contract. See DAMAGES, 2.
Maintain, in statute. See SCHOOLS AND SCHOOL DISTRICTS, 2.
Means other than use of drugs, in statute. See CRIMINAL LAW, 1.
Of all claims, in release. See PHYSICIANS AND SURGEONS, 7.
Open, in letter. See LIBEL AND SLANDER, 8.
Option, in contract. See LANDLORD AND TENANT, 1.
Party, in surety bond. See BONDS.
Penalty, in contract. See DAMAGES, 2.
Permission, in lease. See LANDLORD AND TENANT, 4.

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Performing service growing out of and incidental to his employment, in statute. See WORKMEN'S COMPENSATION, 2.
Proximately caused by accident, in statute. See WORKMEN'S COMPENSATION, 8.
Restraint of trade, in statute. See MONOPOLIES, 2.
Slight want of ordinary care, in statute. See RAILROADS, 1.
Stated cash value, in statute. See TRADING STAMPS.
Subject to mortgages, in contract. See VENDOR AND PURCHASER, 1.
Teacher and *teaching,* in statute. See SCHOOLS AND SCHOOL DISTRICTS, 8.
To all intents and purposes, in statute. See INSURANCE, 3.
Transaction or communication, in statute. See EVIDENCE, 7.
Unlawful preference, in statute. See BANKRUPTCY, 2.
Use, in contract. See PARTY WALLS.
Valuation, in statute. See CARRIERS, 7.
Void, in statute. See CORPORATIONS, 25.
Wilful failure, in statute. See WORKMEN'S COMPENSATION, 15.
Without giving warning, in pleading. See MASTER AND SERVANT, 6.

WORKMEN'S COMPENSATION.

Contract of employment: "Service growing out of and incidental to employment."

1. When the contract of employment contemplates that the employee shall sleep upon the premises of the employer, the employee is considered to be performing service growing out of and incidental to such employment during the time he is on said premises. *Holt L. Co. v. Industrial Comm.* 381

2. Thus, where a person continuously employed in the woods by a lumber company, under its care and protection at night as well as during the day, and required to sleep in its camp, was injured while in his bunk in the evening by a straw falling from the bunk above and lodging in his throat, he was at the time performing service growing out of and incidental to his employment, within the meaning of sub. (2), sec. 2394—3, Stats. *Ibid.*

3. A mechanic was given charge of his employer's pit at automobile races, with instructions to work on the cars there and not to leave the pit. Contrary to orders he left the pit and stood upon the fence at the inside of the race track. While there, during a race, he saw one of his employer's cars stop on the track a short distance away. He ran toward it, but before reaching it was struck by an oncoming car and killed. *Held,* that he was at the time performing service growing out of and incidental to his employment, and that the mere fact that he had disobeyed orders did not preclude an award of compensation for his death. *Frint Motor Car Co. v. Industrial Comm.* 436

Same: Casual employment.

4. Where a mechanic regularly employed in a warehouse to keep automobiles in proper condition was temporarily transferred to similar work at races in which, for advertising purposes, his employer had entered cars, the latter employment was not casual, even though entering cars in races was not a part of the regular work of the employer. *Frint Motor Car Co. v. Industrial Comm.* 436

Same: Presumption against suicide.

5. Where the foreman of a crew engaged in constructing a logging road and dynamiting stumps therein was instantly killed during the noon hour, while the other men were at dinner, by an explosion of dyna-

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mite under circumstances indicating that he may have been attempting to blow up a small tree or a partly blasted stump which had been left in the roadway, a finding by the industrial commission that he was at the time performing service growing out of and incidental to his employment is *held* to have been warranted. The presumption against suicide was properly applied. *Bekkedal L. Co. v. Industrial Comm.* 230

Proximate cause of injury: Exposure to cold: Accidental injury.

6. Under the statute, compensation is not given for an injury resulting from exposure to a hazard (such as freezing) which is not peculiar to the industry or substantially increased by reason of the nature of the services which the employee is required to perform. *Ellingson L. Co. v. Industrial Comm.* 227

7. The causative danger need not have been foreseen or expected, but after its event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. *Ibid.*

8. Where, by reason of a misunderstanding of orders, a woodsman was, on a very cold day, obliged to work harder than usual in getting out logs for hauling, and as a result his feet became wet from perspiration and froze as he returned to camp, it is *held* that the exposure to injury by freezing was substantially increased by reason of the nature of the services he was obliged to perform, and that the injury was proximately caused by accident within the meaning of sub. (3), sec. 2394—3, Stats. *Ibid.*

Validity of contract of employment: Sunday work.

9. The right of recovery under the compensation act does not depend upon the validity of the contract of employment. *Frint Motor Car Co. v. Industrial Comm.* 436

10. Where the relation of master and servant existed prior to and on the day of an accident in which the servant was injured while doing work for the master in the line of his duty, the mere fact that he was at the time violating the Sunday law does not preclude an award of compensation, where such violation did not contribute to the injury. *Ibid.*

Antecedent disability: Primary cause of injury.

11. Where an employee, in the performance of his duties, sustained a rupture of the small intestine which was caused by the fall of an elevator and resulted in his death on the next day, the fact that he would not have been hurt very badly if he had not been ruptured before the accident or if he had not been wearing an improperly fitting truss did not affect the right to compensation under the statute. *F. Eggers V. S. Co. v. Industrial Comm.* 377

12. The testimony of a physician that, when called to attend the employee within an hour after the accident, the injured man told him that the drop of the elevator hurt him, and that when he examined the injured intestine and the imperfect truss he concluded that the shock caused by the drop of the car was the primary cause of the injury, was competent and was sufficient to warrant a conclusion that the injury was proximately caused by the accident. *Ibid.*

Same: Inherited or acquired weakness: Hernia: Requirement by industrial commission as to proof.

13. In compensation cases it may be assumed, as matter of common knowledge, that inguinal hernia is rarely caused by accident, but is generally the result of inherited or acquired weakness. *Meade v. Wis. M. M. Co.* 250

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14. A requirement by the industrial commission that where compensation is claimed in cases of hernia there must be definite proof that the hernia was produced by accident, and to that end that the claimant must prove that the accident was such as could produce hernia, that the hernia appeared immediately after the accident, and that it was followed by pain immediately disabling the claimant, is *held* not unreasonable; and a finding by the commission in this case that the claimant had failed to make such proof is *held* to have been warranted. *Ibid.*

Compensation reduced because of failure to obey rules.

15. Under sub. (5) (j) (k), sec. 2394—9, Stats., providing for reduction of compensation fifteen per cent. where injury results from the employee's wilful failure to obey any reasonable rule adopted by the employer for his safety, the disobedience must, in order to have such effect, have been deliberate, not merely a thoughtless act on the spur of the moment. *Frint Motor Car Co. v. Industrial Comm.* 436

Hearing before commission: Employer's report of accident: Evidence.

16. A report of an accident filed by the employer with the industrial commission, stating that the operator of an elevator lost control of it and it fell and that the deceased was in the car and was injured, was competent evidence at the hearing before the commission, even though not formally offered in evidence, and established a *prima facie* case. *F. Eggers V. S. Co. v. Industrial Comm.* 377

Judicial review: Notice of appeal: Service on "adverse party."

17. Notice of an appeal by the employer from a judgment affirming an award under the workmen's compensation act must be served upon the claimants in whose favor such judgment was rendered, they being the "adverse parties," within the meaning of sec. 3049, Stats. Service upon the attorney general (who, though required by law to appear on behalf of the industrial commission, is not made attorney for the claimants) is not sufficient. *Frontier M. Co. v. Industrial Comm.* 157

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